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Is Parenting Authority a Usurpation of Judicial Authority? Harmonizing Authority for, Benefits of, and Limitations on this Legal-Psychological Hybrid

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ESSAY

**IS PARENTING AUTHORITY A USURPATION OF
JUDICIAL AUTHORITY? HARMONIZING AUTHORITY
FOR, BENEFITS OF, AND LIMITATIONS ON THIS
LEGAL-PSYCHOLOGICAL HYBRID**

*Joi T. Montiel*¹

ABSTRACT

A “Parenting Coordinator” assists high-conflict parents in resolving disputes that arise in the parents’ efforts to jointly parent their children after a divorce. The Parenting Coordinator simultaneously educates the parents to minimize the degree and frequency of future conflict. While Parenting Coordination is not mediation or arbitration, it is also not counseling. Instead, Parenting Coordination is a “legal-psychological hybrid.”

A trial court’s delegation to a parenting coordinator to determine a fit parent’s access to her child is arguably an improper delegation of judicial authority. While thirteen states have comprehensive schemes setting out their Parenting Coordination programs, other states are utilizing Parenting Coordination without statutory or rule-based authorization. Appointments without statutory or rule-based authority are particularly vulnerable to challenge.

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Whether a Parenting Coordinator's appointment is an improper delegation of judicial authority depends on the authority for the appointment in the given jurisdiction and the terms governing the specific appointment. This Article analyzes the use of Parenting Coordination in jurisdictions that appoint Parenting Coordinators both with and without specific authority. From that analysis, this Article offers a paradigm for constructing an appointment that does not constitute an improper delegation of judicial authority. The paradigm will be useful for judges and practitioners attempting to utilize Parenting Coordination without specific statutory or rule-based authority. It will also be useful for courts and legislators considering adoption of a Parenting Coordinator rule or statute.

The Article proposes that, where a trial court has some inherent authority to ensure the best interest of the children, with or without specific statute or rule-based authority, Parenting Coordination can be sustained. Combined with the substantial benefits of a qualified Parenting Coordinator, imposing appropriate limitations on the Parenting Coordinator's role can incrementally diminish the argument that the appointment is an improper delegation of judicial authority. Achieving an appropriate balance of benefits and limitations, in light of the basis for appointment authority, achieves a sustainable appointment.

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I. Introduction

A Parenting Coordinator assists high-conflict parents in resolving disputes that arise in the parents' efforts to jointly parent their children after a divorce. The Parenting Coordinator also educates the high-conflict parents to minimize the degree and frequency of future conflict. Parenting Coordination is not mediation or arbitration, or counseling. Instead, Parenting Coordination is a "legal-psychological hybrid."² Because it does not fit into a category of familiar extra-judicial roles, Parenting Coordination is subject to challenge as being an improper delegation of judicial authority.³

Whether appointing a Parenting Coordinator is an improper delegation of judicial authority depends on the authority for the appointment in the given jurisdiction and the terms governing the specific appointment. Although thirteen states have adopted court rules or statutes authorizing the appointment of a Parenting Coordinator,⁴ courts in many states are appointing Parenting Coordinators without authority from a statute or court rule.⁵ This Article analyzes the use of Parenting Coordination in jurisdictions that appoint Parenting Coordinators both with and without specific authority. From that analysis, this Article offers a paradigm for constructing an appointment that does not constitute an improper delegation of judicial authority. The

² Karl Kirkland & Matthew J. Sullivan, *Parenting Coordination (PC) Practice: A Survey of Experienced Professionals*, 46 FAM. CT. REV. 622, 633 (2008); Matthew J. Sullivan, *Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases*, 42 FAM. CT. REV. 576 (2004).

³ Association of Family and Conciliation Courts ("AFCC"), *Parenting Coordination: Implementation Issues*, 41 FAM. CT. REV. 533 (2003) [hereinafter AFCC, *Implementation Issues*]; Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 249-50 (2004).

⁴ See *infra* note 28.

⁵ See *infra* note 29.

paradigm will be useful for judges and practitioners who are utilizing Parenting Coordination without specific statutory or rule-based authority. It will also be useful for courts and legislatures that are considering adopting a Parenting Coordinator rule or statute.

II. Background and Summary

Parents have due process rights to make decisions about their children under the Fourteenth Amendment.⁶ However, based on the doctrine of *parens patriae*, the state may in certain instances permissibly invade the otherwise high walls of the family in the best interest of the children. Given the parents' submission to a court's jurisdiction in a divorce proceeding, it is accepted that a trial court judge will make decisions regarding the parents' access to their children. However, when the trial court judge delegates the power to determine a fit parent's access to her child to a third party such as a lawyer or a psychologist who has not been selected in the same manner that a member of the judiciary has been selected,⁷ the decision-making by that third-party delegate raises concern.

Nevertheless, when parties divorce, people other than the judge, the parents, their lawyers, and the children frequently become involved in the process. For example, the court may appoint a guardian ad litem, special master, custody evaluator, or mediator. Courts frequently delegate

⁶ Troxel v. Granville, 530 U.S. 57, 66 (2000) (“[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

⁷ See Salt Lake City v. Ohms, 881 P.2d 844, 851 (Utah 1994) (stating that non-judges cannot properly be assigned core judicial duties because “[t]here are no provisions which subject them to the constitutional checks and balances imposed upon duly appointed judges of courts of record.”).

what might appear to be judicial functions, even decision-making authority, to such third parties.

A relatively new third-party delegee is the Parenting Coordinator.⁸ A Parenting Coordinator assists high-conflict parents after their divorce in resolving disputes that arise in implementing the parenting aspect of their divorce judgment. Parenting Coordinators also educate the parents to minimize the degree and frequency of future conflict. The Association of Family and Conciliation Courts (“AFCC”) defines Parenting Coordination as:

[A] child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about their children’s needs, and with prior approval of the parties and/or the court,

⁸ Although the role of a Parenting Coordinator is somewhat similar across jurisdictions, the nomenclature used in the various jurisdictions has “almost been one for each different jurisdiction.” Karl Kirkland, *Parenting Coordination (PC) Laws, Rules, and Regulations: A Jurisdictional Comparison*, 5 J. OF CHILD CUSTODY 25, 28 (2008) [hereinafter Kirkland, *PC Laws, Rules and Regulations*]. The AFCC has noted that a Parenting Coordinator may be called a “special master” in California, a “med-arbiter” in Colorado, a “wise person” in New Mexico, a “custody commissioner” in Hawaii, to list a few. AFCC, *Implementation Issues*, *supra* note 3, at 534 n.3. This difference in nomenclature has been recognized as a problem; inconsistent nomenclature has been found to be a risk for board complaints and civil lawsuits against the Parenting Coordinator, presumably because the inconsistency causes parties to misunderstand the role. Karl Kirkland & Kale E. Kirkland, *Risk Management and Aspirational Ethics for Parenting Coordinators*, 3 J. OF CHILD CUSTODY 23, 30-31 (2008) (in a section of the article cleverly entitled “A Rose by any other name does not smell as sweet”). The AFCC Parenting Coordination study group has recommended the use of the term “Parenting Coordinator.” *Id.* (citing AFCC, *Implementation Issues*, *supra* note 3, at 533).

making decisions within the scope of the court order or appointment contract.⁹

Although it might be viewed as an alternative dispute resolution process, Parenting Coordination is not mediation or arbitration. It is also not counseling. Parenting Coordination is a “legal-psychological hybrid.”¹⁰ Because the role of a Parenting Coordinator does not conform to the role of any familiar extra-judicial delegee such as a mediator or special master, Parenting Coordination is subject to challenge as being an improper delegation of judicial authority lacking legislative authority,¹¹ particularly where no statute or court rule specifically authorizes the appointment of a Parenting Coordinator.

While thirteen states have comprehensive schemes setting out their Parenting Coordination programs,¹² other states are utilizing Parenting Coordination without statutory or rule-based authorization.¹³ The results of implementing a Parenting Coordination program on such an ad hoc basis are inefficient testing of the legality of Parenting Coordination¹⁴ and inconsistent use of Parenting

⁹ AFCC Task Force on Parenting Coordination, *Guidelines for Parenting Coordination*, 44 FAM. CT. REV. 164, 165 (2006) [hereinafter AFCC, *Guidelines*].

¹⁰ Kirkland & Sullivan, *supra* note 2, at 633; Matthew J. Sullivan, *supra* note 2, at 576.

¹¹ Coates et al., *supra* note 3, at 249-50; AFCC: *Implementation Issues*, *supra* note 3, at 533.

¹² See *infra* note 28.

¹³ See *infra* note 29.

¹⁴ A leader in the Parenting Coordination movement and an attorney in Oklahoma, the first state to pass a Parenting Coordination law, noted that in the process of developing a Parenting Coordination program in Oklahoma, they realized that they had to have a new law to legally do what they were trying to do. Without a new law allowing for a Parenting Coordinator, a court cannot delegate decision-making authority to a third party that invades the “high walls of the family.” Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8, at 29.

Coordination, thus diminishing the perceived and actual utility of Parenting Coordination.¹⁵ Parenting Coordination, properly utilized, provides substantial benefits for dueling divorced parents, their children, and the court system. However, if Parenting Coordination is hastily implemented on an ad hoc basis – without fully considering the basis for the authority and the proper limitations on the role – confusion among parties, practitioners, and courts will result,¹⁶ the “brand”¹⁷ of Parenting Coordination will be damaged, and the opportunity to reap the benefits from Parenting Coordination will be lost. Thus, the paradigm

¹⁵ Elayne E. Greenberg, *Fine Tuning the Branding of Parenting Coordination*: “. . . You May Get What You Need,” 48 FAM. CT. REV. 206, 206 (Jan. 2010) (asking how Parenting Coordination professionals might address the “cacophony of discordant expectations and disparate practices about parenting coordination that are eroding the integrity of the parenting coordination process”). *But see* Karl Kirkland, *Positive Coping Among Experienced Parenting Coordinators: A Recipe for Success*, 7 J. OF CHILD CUSTODY 61, 64 (2010) [hereinafter Kirkland, *Positive Coping*] (opining that the diversity of experience “ultimately benefits the larger practice community” by providing learning opportunities through the comparison of the varying practices but also recognizing that there should be “movement toward greater uniformity” in the practice of Parenting Coordination).

¹⁶ Leslie Ellen Shear, *In Search of Statutory Authority for Parenting Coordination Orders in California: Using a Grass-roots, Hybrid Model Without an Enabling Statute*, 5 J. OF CHILD CUSTODY 88, 91 (2008) (stating that appointment of a Parenting Coordinator “requires clear, highly-detailed ground rules, so that the litigants and a non-lawyer PC will understand them, know what to expect, and understand the waivers of formal due process rights”). “Litigation and appeals to resolve ambiguities, inconsistencies and uncertainties about the scope of the PC’s authority . . . will defeat the purposes of the appointment.” *Id.* It has been suggested to the author by practicing attorneys that they and their clients are reluctant to object to the appointment of a Parenting Coordinator for fear of alienating the Parenting Coordinator whose decisions will be so vital to the parties’ relationships with their children.

¹⁷ Greenberg, *supra* note 15, at 209.

offered in this Article should be carefully considered in advance of an appointment.

This Article proposes that a trial court can use Parenting Coordination, without a Parenting Coordination statute or court rule, in circumstances where a trial court has some inherent authority to ensure the best interest of the children. Combined with the substantial benefits of a qualified Parenting Coordinator, imposing appropriate limitations on the Parenting Coordinator's role can incrementally diminish the argument that the appointment is an improper delegation of judicial authority. In light of the basis for appointment authority, reaching an appropriate balance of benefits and limitations achieves a sustainable appointment.

Part III of this Article acknowledges the argument that Parenting Coordination might constitute an improper delegation of judicial authority. Part IV of this Article recognizes that lack of statutory or rule-based authority for the appointment poses an additional obstacle for Parenting Coordination. However, even where authority for the appointment is somewhat lacking, Parenting Coordination is defensible if appropriately limited because of the benefits it bestows.

The benefits of Parenting Coordination are discussed in Part V. In determining the sustainability of a Parenting Coordination appointment, the benefits that Parenting Coordination can provide must be accorded due weight. Most importantly, Parenting Coordination benefits the children of high-conflict parents. Exposure to conflict is one of the most detrimental factors in a child's post-divorce development, and it is the State's duty to ensure the furtherance of the best interest of those children. Second, Parenting Coordination benefits the judicial system by preventing the trial court from becoming a revolving door for the high-conflict parents that Parenting Coordination serves. Third, Parenting Coordination benefits the high-conflict parents themselves by providing a timely and cost-

effective means of dispute resolution that also educates the parents in ways to avoid or resolve conflict on their own in the future.

Significantly, as discussed in Part VI of this Article, a Parenting Coordinator must have adequate qualifications so that he can provide the benefits referenced above. Those benefits may be realized only when the Parenting Coordinator has adequate qualifications to serve in the “legally-psychological hybrid” role of a Parenting Coordinator. If the Parenting Coordinator does not have adequate qualifications, the proposition of this Article does not hold true. The Parenting Coordinator’s ability to provide benefits are a significant part of the equation: benefits of Parenting Coordination combined with limitations on Parenting Coordination overcome the arguments against Parenting Coordination considered here.

Limitations on Parenting Coordination are discussed in Parts VII through X of this Article. These limitations on Parenting Coordination abate the argument that the appointment is an improper delegation of judicial authority. First, as addressed in Part VII, a Parenting Coordinator should be appointed only after a trial court has entered a custody order, and the Parenting Coordinator’s role should therefore be limited to disputed issues regarding implementation of that trial court’s order. Second, as discussed in Part VIII, a Parenting Coordinator should be appointed only under certain conditions, such as consent of the parties or a trial court finding that the parents are “high conflict,” so that the appointment is in the best interest of the children who would be otherwise exposed to chronic conflict. Third, as discussed in Part IX, a Parenting Coordinator’s decision, if he has decision-making authority, should always be subject to review by the appointing court. Thus, the trial court retains its judicial authority. As addressed in Part X, Parenting Coordination can be even further limited by allowing a Parenting Coordinator to decide only minor issues, which might be

specified by the appointing court or by court rule or statute, where there is one. Some jurisdictions further limit the instances in which a Parenting Coordinator may have decision-making authority by requiring that the parties specifically consent to the Parenting Coordinator's decision-making authority, a step further than consent to the appointment, before the Parenting Coordinator may have that authority.

Combined with the substantial benefits of a qualified Parenting Coordinator, imposing appropriate limitations on the Parenting Coordinator's role can incrementally diminish the argument that the appointment is an improper delegation of judicial authority, and a sustainable appointment can be achieved even without a Parenting Coordinator statute or court rule.

III. Problem: Delegation of Judicial Authority

Powers of a court are generally nondelegable.¹⁸ A

¹⁸ See, e.g., *Morrow v. Corbin*, 62 S.W.2d 641, 645 (Tex. 1933) (“[T]he power thus confided to our trial courts must be exercised by them as a matter of nondelegable duty, that they can neither with nor without the consent of parties litigant delegate the decision of any question within their jurisdiction, once that jurisdiction has been lawfully invoked. . . .”); *Salt Lake City v. Ohms*, 881 P.2d 844, 851 (Utah 1994) (stating that non-judges cannot properly be assigned core judicial duties because “[t]here are no provisions which subject them to the constitutional checks and balances imposed upon duly appointed judges of courts of record”); *In re S.H.*, 3 Cal. Rptr. 3d 465, 471 n.11 (Cal. Ct. App. 2003) (“Under the separation of powers doctrine judicial powers may not be completely delegated to, or exercised by, either nonjudicial officers or private parties.”) (citing Cal. Const., art. II, § 3 and Cal. Const. art. VI, § 1); *State Farm Mut. Auto. Ins. Co. v. Kendrick*, 780 So. 2d 231, 233 (Fla. Dist. Ct. App. 2001) (“A trial court cannot delegate the sole authority to perform ‘a purely judicial function.’”) (citing *Larson v. State*, 572 So.2d 1368, 1371 (Fla. 1991)); *D’Agostino v. D’Agostino*, 54 S.W.3d 191, 200 (Mo. Ct. App. 2001) (“A court cannot delegate or abdicate, in whole or in part, its judicial power.”) (citing *S.K.B. v. J.C.B.*, 867 S.W.2d 651, 658 (Mo. Ct. App.

trial court's authority is "constrained by the basic constitutional principle that judicial power may not be delegated."¹⁹ However, a trial court may properly delegate certain limited functions.²⁰ Although a state's constitution may generally prohibit the delegation of judicial authority, the delegation of *some* authority to a third party may be permissible or even necessary in some instances.²¹

1993)); *Tabor v. Hogan*, 955 S.W.2d 894, 897 (Tex. Ct. App. 1997) ("Those enumerated powers are non-delegable[;] [s]imply put, the trial judge may not relinquish them to others.").

¹⁹ *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 772 (Cal. Ct. App. 1997).

²⁰ While a core judicial function cannot be delegated, other duties might be properly delegated; the courts may receive assistance from others in performing core judicial functions. "The term 'judicial power of courts' is generally understood to be the power to hear and determine controversies between adverse parties and questions in litigation;" the nondelegable judicial powers include the authority to hear and determine justiciable controversies, the authority to enforce a valid judgment, and the power necessary to "protect the fundamental integrity of the judicial branch." *In re Adoption of E.H.*, 103 P.3d 177, 182 n.7 (Utah Ct. App. 2004) (quoting *Ohms*, 881 P.2d at 181-82 n.6); see also *Morrow*, 62 S.W.2d at 645 n.17. However, core judicial functions, "do not include functions that are generally designed to 'assist' courts, such as conducting fact finding hearings, holding pretrial conferences, and making recommendations to judges." *State v. Thomas*, 961 P.2d 299, 302 (Utah 1998) (quoting *Ohms*, 881 P.2d at 851 n.17).

²¹ *In re J.S.P.*, 278 S.W.3d 414, 422 (Tex. Ct. App. 2008) ("We recognize that under our Constitution, once the jurisdiction of the court has been invoked, it is the trial judge who possesses the judicial power to hear cases, decide disputed issues of fact and law, enter a judgment in accordance with the facts and the law, and enforce its judgment once entered. . . . While we cannot, and do not, condone a wholesale delegation of judicial authority . . . we recognize that there are limited circumstances . . . where delegation of some authority to a third party may be necessary . . ."). The court pointed out, however, that the trial court's ability to delegate is not limitless. *Id.*; see also, e.g., *In re Donovan*, 68 Cal. Rptr. 2d 714, 716 (Cal. Ct. App. 1997) (stating "[a]lthough a court may base its determination of the appropriateness of visitation on input from therapists, it is the court's duty to make the actual determination" and holding that an order providing that the

Thus, Parenting Coordination is subject to challenge as an improper delegation of judicial authority that lacks legislative authority, because it does not “fit” within the parameters of familiar extra-judicial roles. The process varies across the jurisdictions utilizing Parenting Coordination. Different jurisdictions may delegate different types of duties to a Parenting Coordinator.²² In addition, jurisdictions may tolerate delegations of judicial authority to varying degrees.²³ Thus, a trial court’s appointment of a Parenting Coordinator in any jurisdiction raises the question of whether the appointment violates the general principles regarding delegation of judicial authority applicable in that state.²⁴ Below, this Article addresses the

father have “no visitation rights without permission of minors’ therapists” was an improper delegation of judicial authority). A court delegating some authority must nevertheless be more than a reviewing court. *Russell v. Thompson*, 619 P.2d 537, 539 (Nev. 1980) (holding, where the trial court gave the master the authority to find facts and decide substantially all issues in the case, the trial court’s function has been reduced to that of a reviewing court and thus was an “abdication by a jurist of his constitutional responsibilities and duties”).

²² See *infra* Part IX and note 155 (Parenting Coordination statutes and rules in Arizona, Colorado, Florida, Idaho, North Carolina, and Oklahoma allow for decision making by the Parenting Coordinator, while Parenting Coordination statutes and rules of Louisiana, Oregon, Texas, and Vermont do not allow for decision-making authority).

²³ See Coates et al., *supra* note 3, (“The degree to which [Parenting Coordination] is seen as a usurpation of the court’s inherent decision-making authority depends on a jurisdiction’s interpretation of applicable laws and the local legal culture. The more that third-party professionals (e.g., evaluators, mediators, therapists, special masters, and referees) are looked to for assessment of a family’s situation and relied on for recommendations as to “best interest” determinations, the more likely the PC model will be accepted as yet another valuable intervention at the court’s disposal to assist in dispute resolution.”).

²⁴ The AFCC Guidelines also recognize that a Parenting Coordinator’s exercise of decision-making authority – by court order or consent – could be statutorily or constitutionally impermissible in the given jurisdiction. AFCC, *Guidelines*, *supra* note 8, at 172. (“The scope of the PC’s decision-making authority may be limited in some

issues to be considered in answering that question. The answer will depend on (1) the source of the trial court's authority to make the appointment, which is discussed in Part IV, (2) the benefits to be bestowed by the appointment, which are discussed in Part V and VI, and (3) whether the role is properly limited, which is discussed in Parts VII through X. An appropriate combination of authority and limitation can withstand an argument that Parenting Coordination is an improper delegation of judicial authority.

IV. Problem and Possible Solutions: Finding Authority to Appoint the Parenting Coordinator

Parenting Coordination is "an ADR activity."²⁵ However, it is not mediation and it is not arbitration. It cannot be understood as anything other than a hybrid role combining aspects of familiar alternative dispute resolution processes and adding a dose of education, or counseling.²⁶ Thus, Parenting Coordination does not "fit" within the parameters of familiar legal processes.²⁷ Thirteen states

jurisdictions by constitutional law or statute. A PC should be knowledgeable about governing law and procedure in the PC's jurisdiction regarding decision-making or arbitration by the PC.")

²⁵ Kirkland & Sullivan, *supra* note 2, at 633.

²⁶ Although a Parenting Coordinator is often a psychologist, "PC is not therapy." *Id.* (explaining that Parenting Coordination is distinct from psychotherapy in many respects). One Parenting Coordinator stated: "As a PC, I'm a junior judge, not an evaluator or a therapist." *Id.* at 629 (quoting a Parenting Coordinator who holds a J.D. and a Ph.D.). Perhaps most significant for the instant purposes is that, in Parenting Coordination, the focus of the service is on the best interests of the children and on reorganized family; it is not on any one of the parents seeing the Parenting Coordinator. *See id.*

²⁷ Shear, *supra* note 16 (explaining statutory schemes such as those for mediation, child custody evaluation, child custody counseling, and judicial reference have specific and mutually exclusive requirements and therefore cannot be merged to create the Parenting Coordination model).

have adopted statutes or court rules permitting Parenting Coordination, some with and some without decision-making authority.²⁸ At least ten states, however, are utilizing Parenting Coordination without specific authority.²⁹ Where the Parenting Coordinator's role is completely dependent on a court order – that is, where

²⁸ Arizona: ARIZ. R. FAM. L. PROC. 74; Colorado: COLO. REV. STAT. ANN. §§ 14-10-128.1, 128.3 (West 2010); Florida: FLA. STAT. ANN. § 61-125 (West 2010); Idaho: IDAHO CODE ANN. § 32-717D (2010); Idaho R. CIV. P. 16(l)(3); Louisiana: LA. REV. STAT. ANN. § 9:358:1 (2010); Maine: ME. REV. STAT. ANN. tit. 19-A, § 1659 (2009); Minnesota: MINN. STAT. ANN. § 518.1751 (West 2010); North Carolina: N.C. GEN. STAT. ANN. § 50-91 (West 2010); Oklahoma: OKLA. STAT. ANN. tit. 43, § 120.1 (West 2010); Oregon: OR. REV. STAT. ANN. § 107.425 (West 2010); Texas: TEX. FAM. CODE ANN. § 153.605 (Vernon 2009); Vermont: VT. FAM. P.R. 4(s); West Virginia: W. VA. CODE ANN. § 48-9-208 (West 2010).

²⁹ It is difficult to ascertain precisely how many states are using Parenting Coordination without statutory or rule based authority because, in a jurisdiction utilizing Parenting Coordination, there may not be published decisions reflecting the appointment and, even if there are published decisions reflecting the use of Parenting Coordination, those decision are not easily identifiable if the decision does not use the term “Parenting Coordinator.” See Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8, at 28, regarding inconsistent nomenclature. However, ten states utilize Parenting Coordination with specific statutory or rule-based authority authorizing the appointment of a Parenting Coordinator. Alabama: G.R.V. v. M.V., 825 So. 2d 116, 118 (Ala. Civ. App. 2001); California: Shear, *supra* note 16, at 90 (referencing California's then-fourteen years of experimentation with Parenting Coordination without enabling legislation); Delaware: D.W. v. R.E., No. CN07-03739, 2009, WL 6303016 (Del. Fam. Ct. July 28, 2009); Illinois: *In re C.N.*, 752 N.E.2d 1030 (Ill. 2001); Indiana: Higginbotham v. Higginbotham, 822 N.E.2d 609 (Ind. Ct. App. 2004); Kentucky: Telek v. Bucher, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. April 2, 2010); Nevada: Pierce v. Ciccarone, No. 52515, 2008 WL 6124780 (Nev. Dec. 18, 2008); New York: L.S. v. L.F., 803 N.Y.S.2d 881 (Sup. Ct. 2005); Pennsylvania: Yates v. Yates, 963 A.2d 535 (Pa. Super. Ct. 2008); Tennessee: Nesbitt v. Nesbitt, No. M2006-02645-COA-R3-CV, 2009 WL 112538 (Tenn. Ct. App. Jan. 14, 2009).

there is no statute or rule that provides for its appointment – the question is whether the court has the authority to order the appointment. Can that authority be based on existing laws permitting a trial court to send a matter to mediation or arbitration, or to appoint a special master? Can that authority be based on a trial court’s inherent authority? These questions make Parenting Coordination vulnerable to challenge as an unauthorized delegation of judicial authority.

Parenting Coordination borrows aspects of different extra-judicial devices that trial courts are authorized to utilize. For example, a Parenting Coordinator assists parties in an attempt to “mediate” a dispute and, when he makes a decision, acts similar to an arbitrator or special master. However, a Parenting Coordinator differs from a mediator, arbitrator, or a special master in fundamental ways. Thus, statutes and court rules that authorize a trial court’s use of those alternative devices do not necessarily authorize a trial court’s use of Parenting Coordination.³⁰

If a Parenting Coordinator is appointed under a statute or rule authorizing some other process, the Parenting Coordinator will and should be expected to adhere to the procedures prescribed by the authorizing statute or rule; and if he does not, will be subject to allegations that he has violated the statute or rule that served as the ostensible basis for the appointment.³¹ At the

³⁰ A leader in the Parenting Coordination movement and an attorney in Oklahoma, the first state to pass a Parenting Coordination law, noted that in the process of developing a Parenting Coordination program in Oklahoma, they realized that they had to have a new law to legally do what they were trying to do. Without a new law allowing for a parenting coordinator, a court cannot delegate decision-making authority to a third party that invades the “high walls of the family.” AFCC, *Implementation Issues*, *supra* note 3, at 537.

³¹ Shear, *supra* note 16, at 92 (explaining that the practice of invoking laws governing or processes such as mediation as the basis for authority for Parenting Coordination “opens the door to court challenges on the grounds of non-compliance with the governing law for each of those

same time, if the Parenting Coordinator does adhere to the procedures prescribed by a statute that authorizes mediation or arbitration, for example, he is not conducting Parenting Coordination with all of its benefits.³² Furthermore, qualifications that are needed in a Parenting Coordinator differ from qualifications required for other roles such as mediator, arbitrator, or special master. For these reasons, a Parenting Coordination appointment should not rest on statutes authorizing a trial court to utilize other processes such as mediation, arbitration, or reference to a special master. Problems in relying on such statutes are examined more closely below in Parts A, B, and C. In addition, as discussed in Parts D and E, other potential sources of authority exist that can support the appointment of a Parenting Coordinator.

A. Statutes and Rules Authorizing Mediation as Potential Sources of Authority for Parenting Coordination

models”). *See, e.g.,* *Heinonen v. Heinonen*, 14 P.3d 96, 98-99 (Or. Ct. App. 2000) (rejecting the idea that the delegation of authority to the Parenting Coordinator was a permissible form of mediation because the mediation statute did not authorize a trial court to delegate authority to a mediator to make a binding ruling “against the wishes of one of the parties”).

³² He also risks accusations of legal and ethical violations due to confusion about the varying. *See* Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8, at 28 (“Inappropriate and inconsistent use of titles and functions in this arena has been found to be a major risk for board complaints and civil lawsuits.”) (citing Kirkland, et al., *Quasi-Judicial Immunity for Forensic Mental Health Professionals in Court-Appointed Roles*, 3 J. OF CHILD CUSTODY 1 (2006)); *see also* Sullivan, *supra* note 2, at 576 (explaining that the lack of coordination of review processes creates a “minefield of professional risk” for a psychologist servicing as a Parenting Coordinator). In addition, if Parenting Coordination is hastily implemented on an ad hoc basis, the “brand” of Parenting Coordination is subject to damage, and the opportunity to reap the benefits to be gained from Parenting Coordination will be lost. Greenberg, *supra* note 15, at 209.

Statutes or rules of court that authorize a trial court to order mediation should not be construed to also approve of Parenting Coordination.³³ Of course, where a Parenting Coordinator has decision-making authority, statutes authorizing mediation, which do not allow for decision-making by a mediator, cannot be the basis for the authority.³⁴ Even where a Parenting Coordinator does *not* have decision-making authority, a mediation statute is not a sound basis for authority to appoint a Parenting Coordinator.³⁵ The processes of mediation and Parenting Coordination are fundamentally different. A Parenting Coordinator's role is similar to that of a mediator in that the goal is to facilitate the parties' mutual agreement regarding the resolution of a given dispute.³⁶ The methods by which those disputes are resolved are also somewhat similar. Parties typically communicate *ex parte* with a mediator in mediation and with a Parenting Coordinator in Parenting Coordination in an effort to reach a mutual agreement.³⁷

³³ *Heinonen*, 14 P.3d at 98 (rejecting the argument that the delegation of authority to the Parenting Coordinator was a permissible form of mediation and recognizing that the statutes contemplated mediation to resolve parenting time and visitation issues but that they did not authorize a trial court to delegate authority to a mediator to make a binding ruling "against the wishes of one of the parties.") (citing OR. REV. STAT. ANN. § 765(1) (West 2010)). *See also* Shear, *supra* note 16, at 94 (explaining that invoking a mediation statute as the basis for authority to appoint a Parenting Coordinator is "problematic" because, among other things, mediation is confidential).

³⁴ *Id.*

³⁵ *Id.*

³⁶ AFCC, *Guidelines*, *supra* note 9, at 165 ("Parenting coordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner. . . .").

³⁷ AFCC, *Guidelines*, *supra* note 9, at 170-71 (stating in Guideline X that "[b]ecause parenting coordination is a non-adversarial process designed to reduce acrimony and settle disputes efficiently, a PC may engage in *ex parte* (individual) communications with each of the parties

However, the roles are significantly different with regard to reporting to the court about the results of the process. Mediation of child custody matters is generally confidential.³⁸ A mediator typically may not report to the court any information beyond whether the matter was settled through the mediation process. In contrast, Parenting Coordination is not confidential; the Parenting Coordination may file reports with the court or even be called to testify.³⁹ Because of these fundamental differences between mediation and Parenting Coordination, statutes or rules of court that have authorized a trial court to utilize mediation cannot be construed to also approve of a fundamentally different process of Parenting Coordination.⁴⁰

B. Statutes or Rules Authorizing Appointment of a Special Master as Potential Sources of Authority for Appointing a Parenting Coordinator

To the extent that a Parenting Coordinator does make recommendations to the court or decisions in the parties' dispute, his role might be compared to that of a

and/or their attorneys, if specified in writing in the order of appointment, PC agreement or stipulation").

³⁸ Carrie-Anne Tondo, et al., *Mediation Trends: A Survey of the States*, 39 FAM. CT. REV. 431, 433 (2001).

³⁹ Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8, at 42 (explaining that this "reporting back to the court feature" distinguishes Parenting Coordination from mediation and is the "teeth" that compels the parties to respect the Parenting Coordination process).

⁴⁰ Authority for ordering mediation is particularly weak as a source for ordering Parenting Coordination if the trial court seeks to appoint a Parenting Coordinator with decision-making authority. Mediators do not make decisions. *See id.* ("Unlike mediation, PC includes investigative, probative, evaluative, reporting, and decision-making components designed to help post-divorce couple navigate parenting disputes.").

special master.⁴¹ Thus, it is prudent to consider whether a decision-making Parenting Coordinator could be appointed under the same authority that allows a court to appoint a special master.

Most states provide some procedure that allows courts to appoint special masters to handle certain aspects of litigation.⁴² Twenty-three states have a rule of civil procedure that nearly mirrors the pre-2003 amended Federal Rule of Civil Procedure 53.⁴³ A special master statute or rule that is modeled after the pre-2003 Federal Rule of Civil Procedure 53 would limit the matters that can be referred to a master.⁴⁴ Under Rule 53, in a non-jury case, such as a divorce action in state court, reference to a special master may be made only upon a showing that “some exceptional condition” requires the reference.⁴⁵ Thus, a child custody or visitation matter is not appropriate to refer to a special master unless there is a showing of an “exceptional condition” requiring the reference. Limited available court time and overloaded dockets do not constitute “exceptional conditions” warranting referrals of family court matters to a special master.⁴⁶ Thus, such a rule

⁴¹ Terminology varies among the states; the same role might be called a “referee” or “commissioner.” See Lynn Jokela & David F. Herr, *Special Masters in State Court Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1300, 1325 (2005) (chart summarizing each state's form of Rule 53).

⁴² *Id.* at 1301-02. Illinois is the only state that does not have any mechanism governing appointment of special masters. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ FED. R. CIV. P. 53.

⁴⁶ See, e.g., *Ex parte Mobayed*, 689 So. 2d 890, 892 -93 (Ala. Civ. App. 1997) (refusing to allow routine reference to a special master, noting that if congestion was an exceptional circumstance to warrant a reference, “present congestion would make references the rule rather than the exception,” which is contrary to the language of the rule itself that requires that reference be the exception not the rule) (citing *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)).

is not likely to provide the rationale for appointment of a Parenting Coordinator. At least four of the states that have been identified⁴⁷ as utilizing Parenting Coordination without specific authority have adopted the pre-2003 version of Fed. R. Civ. P. 53 as their basis for appointing a special master;⁴⁸ thus, a Parenting Coordinator's appointment in those jurisdictions (and any jurisdictions similarly situated) could probably not be based on the state's special master rule.⁴⁹

Some states have rules or statutes providing for special masters that are substantively different from the pre-2003 federal rule discussed above.⁵⁰ Whether appointment of a Parenting Coordinator can be based on a court's authority to appoint a special master will depend on each state's special master authority. California is one state that has specifically determined whether the appointment of a Parenting Coordinator may be based on the state's authority to appoint a special master, or "referee" as it is called in California, and decided that it does not.⁵¹

In California, the appointment of a Parenting Coordinator is dependent on California's special master statute. However, California's special master statute allows

⁴⁷ See *supra* note 29.

⁴⁸ Alabama: ALA. R. CIV. P. 53; Indiana: IND. R. TRIAL. P. 53; Nevada: NEV. R. CIV. P. 53; Tennessee: TENN. R. CIV. P. 53. See Jokela & Herr, *supra* note 41, at 1325 (listing those states as adopting the pre-2003 amended version of the federal rule).

⁴⁹ Interestingly, in 2003, Rule 53 of the Federal Rules of Civil Procedure, was amended to allow courts to appoint special masters to assist with pretrial and post-trial work; adoption of the current version of Rule 53 might therefore provide some basis for authority for appointing a Parenting Coordinator to oversee implementation of a court order. When courts appoint a special master to address pretrial or post-trial matters, it is usually because the court cannot efficiently address the matter. Jokela & Herr, *supra* note 41, at 1301 (citing FED. R. CIV. P. 53 advisory committee's note to 2003 amendments).

⁵⁰ *Id.*

⁵¹ *Id.* at 1322-23.

reference to a special master in limited circumstances. Those limitations make Parenting Coordination impossible without consent of the parties.⁵² For example, a Parenting Coordinator necessarily has to interpret existing court orders. The California Court of Appeals in *Ruisi v. Thieriot* viewed interpretation of existing orders as a question of law, which cannot be referred to a special master without consent.⁵³ Also, appointment of a Parenting Coordinator contemplates that he will address disputes that are, at the time of the appointment, unknown. California's special master statute, however, does not provide authority to refer unknown future disputes to a special master.⁵⁴ Thus, the court determined that, without consent, the role of Parenting Coordinator, which would interpret a court order and address future disputes, could not stand without consent of the parties.⁵⁵

Where a special master rule might provide some authority for the appointment of a Parenting Coordinator, he should follow the procedures of that special master rule that forms the basis for the appointment.⁵⁶ However, in order to bestow all of the benefits of Parenting Coordination – specifically, the educational and counseling component – resort to a special master rule may not be workable.⁵⁷ The counseling and educational components

⁵² *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 774 (Cal. Ct. App. 1997) (stating that the distinction between reference to a special master with consent and reference without consent is “carefully preserved in the statutes in order to comply with the constitutional mandate”).

⁵³ *Id.* (“The trial court has no authority to refer questions of law. . . . Disputes involving interpretation of the existing custody orders, for example, may present questions of law.”).

⁵⁴ *Id.* (“The trial court has no authority to compel a reference of unknown future disputes.”).

⁵⁵ *Id.*

⁵⁶ See generally *id.*

⁵⁷ See *In re Marriage of Rozzi*, 190 P.3d 815, 821 (Colo. Ct. App. 2008) (holding that the trial court could not combine appointment of Parenting Coordinator under Colorado's Parenting Coordinator statute,

that are unique to Parenting Coordination necessarily involve *ex parte* communications. A rule or statute that authorizes appointment of a special master may not tolerate such *ex parte* communications.⁵⁸ Because of that fundamental difference between the role of a Parenting Coordinator and that of a special master, the special master rule or statute is not a well-founded basis for appointment of a Parenting Coordinator.

C. Statutes or Rules Authorizing Arbitration as Possible Sources of Authority for Parenting Coordination

When a Parenting Coordinator does have decision-making authority, his role is somewhat like an arbitrator in that he is making a decision. However, statutes or rules of court that authorize a trial court to order arbitration cannot necessarily be construed to also approve of Parenting Coordination. In determining whether an arbitration statute can form the basis for Parenting Coordination, it is relevant to consider whether the state allows arbitration of child custody issues.

Some states that provide for court-ordered arbitration, generally, nevertheless prohibit arbitration of child custody and visitation issues.⁵⁹ Even parents' agreements to arbitrate custody have been held invalid. It

which does not allow for decision-making authority, with decision-making authority of a special master provided for by Colorado's special master rule).

⁵⁸ *Horton v. Ferrell*, 981 S.W.2d 88, 91 (Ark. 1998) (holding that a special master is a judge subject to the Code of Judicial Conduct and therefore should disqualify after relying upon *ex parte* communications); *State ex rel. Hamrick v. Stucky*, 640 S.E.2d 243, 249 (W. Va. 2006) (holding that a special master is a pro-tempore part-time judge and must comply with the Code of Judicial Conduct).

⁵⁹ *See, e.g., Toiberman v. Tisera*, 998 So. 2d 4, 15 (Fla. App. 2008) (citing FLA. STAT. ANN. § 44.104(14)(West 2011); *Pulfer v. Pulfer*, 673 N.E.2d 656, 659 (Ohio Ct. App. 1996); *Glauber v. Glauber*, 600 N.Y.S.2d 740, 743 (N.Y. 1993).

has been held that parents can never finally contract with respect to the custody of their children because the courts stand in the relation of *parens patriae* to minor children, and therefore, must determine questions of custody and visitation according to the welfare and best interests of the children.⁶⁰ Where a jurisdiction prohibits arbitration of child custody and visitation issues, the court should tread lightly in appointing a Parenting Coordinator and look to other sources of authority to support the appointment.

By agreement of the parties, some courts have allowed arbitration of child custody and visitation.⁶¹ Where

⁶⁰ See, *Glauber*, 600 N.Y.S.2d at 742-43 (“A court cannot be bound by an agreement as to custody and visitation, or either custody or visitation, and simultaneously act as *parens patriae* on behalf of the child.”); *Kelm v. Kelm*, 749 N.E.2d 299, 301 (Ohio 2001) (declining to allow arbitration of child custody issues, which go to the “very core of the child’s welfare and best interests,” because that would “encroach upon the trial court’s traditional role as *parens patriae*”). The court in *Kelm* was not convinced by the argument that the opportunity for judicial review of the arbitration award cured the defect; the court was of the opinion that the opportunity for de novo judicial review of an arbitration award destroys the parties’ expectation that an arbitration award will be final, therefore, the court said, it is, is wasteful of time and duplicative of effort. For that reason, it was not “advantageous to the best interests of children.” *Id.*

⁶¹ See, e.g., *Fawzy v. Fawzy*, 973 A.2d 347, 360 (N.J. 2009) (“The right to parental autonomy subsumes the right to submit issues of child custody and parenting time to an arbitrator for disposition. . . . For us, the bundle of rights that the notion of parental autonomy sweeps in includes the right to decide how issues of custody and parenting time will be resolved. Indeed, we have no hesitation in concluding that, just as parents ‘choose’ to decide issues of custody and parenting time among themselves without court intervention, they may opt to sidestep the judicial process and submit their dispute to an arbitrator whom they have chosen.”) (quoting E. Gary Spitko, *Reclaiming the “Creatures of the State”: Contracting for Child Custody Decision Making in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1210 (Fall 2000)). For further discussion regarding the differing views as to whether to allow arbitration of child custody disputes, see George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIM. LAW. 429, 431-33 (2003).

such precedent exists, a court might more reasonably rely on arbitration authority to order Parenting Coordination.⁶² Nevertheless, there remains the substantive problem with the differences in the procedures. Ex parte communications between the parties and the Parenting Coordinator is troubling when the Parenting Coordinator does have decision-making authority, as he would under authority to arbitrate. In that situation, the parties are, in essence, communicating ex parte with the decision maker. When the judge is a decision maker and parties communicate with him ex parte, he must recuse himself.

If a Parenting Coordinator may serve where a judge could not, any court rule or statute to which a court resorts for appointment authority should clearly contemplate the appointment. Moreover, it must make additional provisions to compensate for the risks inherent in such an arrangement. Thus, authority for appointment of an arbitrator to decide an issue regarding child custody and visitation should not be resorted to as a basis for authority to appoint a Parenting Coordinator.

D. Trial courts' Equitable or Inherent Powers as Possible Sources of Authority for Appointing a Parenting Coordinator

There are some arguments to be made that a trial court has authority to appoint a Parenting Coordinator without specific authority provided by a statute or court rule. In some jurisdictions, a trial court's authority to enter orders regarding custody and visitation of children is based on a court's general equity powers.⁶³ In such jurisdictions,

⁶² Kentucky, for example, allows arbitration of custody matters, *Masterson v Masterson*, 60 S.W. 301 (Ky. App. 1901), and also allows for Parenting Coordination, *see Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. April 2, 2010).

⁶³ Alabama: *Snead v. Davis*, 90 So. 2d 825 (Ala. 1956) (stating that a court of equity awarding custody of children in divorce proceeding is

the appointment of a Parenting Coordinator could be upheld as allowed under the court's broad inherent equity powers, acting as *parens patriae* in the best interest of the children.⁶⁴ Also, it might be upheld as allowed pursuant to the trial court's inherent authority to enforce its own orders and judgments.⁶⁵

In some jurisdictions, however, trial court authority to make determinations about child custody and visitation

exercising its inherent powers); Missouri: *Urbanek v. Urbanek*, 503 S.W.2d 434, 441 (Mo. App. 1973) ("The right and power to determine custody and maintenance of children is not born out of statute, but exists because of the inherent power of courts exercising equitable jurisdiction to care for and provide for a minor child."); *I. v. B.*, 305 S.W.2d 713, 722 (Mo. Ct. App. 1957) (holding that, in determining the custody of a child of divorced parents, the jurisdiction of an equity court is not limited to the express provisions of a statute, but is broad enough to accomplish what is necessary to make a correct determination with respect to the child's custody and welfare); New Jersey: *Henderson v. Henderson*, 91 A.2d 747, 750 (N.J. 1952) (stating that the court has "general equity *parens patriae* jurisdiction" in child custody cases, predicated upon minor's residence in State); *see Clemens v. Clemens*, 90 A.2d 72, 76-77 (App. Div. 1952) (stating that a statute granting authority in divorce actions to make orders touching the care, custody, education, and maintenance of children was not intended to restrict the court's general jurisdiction over child custody).

⁶⁴*See, e.g.*, *Clark v. Clark*, 682 So. 2d 1051, 1054 -55 (Ala. Civ. App. 1996) (stating that, under the statute that provides that, in conjunction with a divorce, a court has "wide discretion" to "make such orders in respect to the custody of the children as their safety and well-being may require").

⁶⁵*See, e.g.*, *Telek*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. April 2, 2010) (indicating that the appointment of a Parenting Coordinator might be proper under the trial court's inherent authority to enforce its own orders) (citing *Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970)). *But see* *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 772 n.10 (Cal. Ct. App. 1997) (rejecting the argument that the court had the authority to refer the matter to a Parenting Coordinator under the statute that allows the court to enforce its orders by any such orders as it determines necessary because the statute does not give the trial court explicitly authority to direct a reference of family law issues).

is statutory.⁶⁶ Thus, the court has no power to do anything other than what is conferred upon the court by statute, perhaps even with consent of the parties.⁶⁷ Under that approach, a Parenting Coordinator probably cannot be permissibly appointed where no statute specifically allows it.⁶⁸ The logical extension of this view is that, even an agreement of the parties to allow a Parenting Coordinator to make decisions is not allowable, because such assignment of a judicial role to a non-judicial designee would be an abridgement of the trial court's statutory authority to make determinations on custody and visitation of a child in the child's best interest.⁶⁹

⁶⁶Colorado: *In re Marriage of Trough*, 631 P.2d 1183, 1185 (Colo. App. 1981) (relying on a statute granting the court the authority to award custody to grandparents); Connecticut: *Fitzgerald v. Fitzgerald*, 362 A.2d 889, 891 (Conn. 1975) (relying on a statute granting the court the authority to award alimony and support through a *pendente lite* hearing); Maine: *Roberts v. Roberts*, 697 A.2d 62, 64 (Me. 1997) (stating that "the custody and support of minor children must be found in the statutes or it does not exist."); Michigan: *Merchant v. Merchant*, 343 N.W.2d 620, 623 (Mich. App. 1983) (reasoning that the court's authority during divorce proceedings is "purely statutory."); New Hampshire: *Stetson v. Stetson*, 171 A.2d 28, 29 (N.H. 1961) ("[T]he power of the Superior Court to award custody of minor children and to make provisions for the support of the wife and the children is wholly statutory, and . . . the court has no independent equity jurisdiction."); Virginia: *Cutshaw v. Cutshaw*, 261 S.E.2d 52, 54 (Va. 1979) ("The jurisdiction of a court to provide for child support pursuant to a divorce is purely statutory.").

⁶⁷ *See, e.g.*, *Miller v. Miller*, 97 N.E.2d 213, 216 (Ohio 1951) ("no jurisdiction other than that granted by statute can be conferred upon such a court even with the consent of the parties to an action").

⁶⁸ *Cf. Avila v. Leonardo*, 128 P.2d 43 (Cal. Dist. Ct. App. 1942) (stating that authority of the court in a divorce action to make necessary orders for the support of the minor children of the marriage is conferred by statute and its exercise cannot be limited or abridged by the parents).

⁶⁹ *See, e.g.*, *Heinonen v. Heinonen*, 14 P.3d 96 (Or. Ct. App. 2000) (holding that, because the trial court's authority is purely statutory and no statute authorizes the trial court to delegate that authority to a Parenting Coordinator, the trial court could not so delegate because

Depending on a jurisdiction's view of the authority of the appointing court – that it can exercise equitable powers as necessary to ensure the best interest of the child on the one hand or as constrained by statute on the other – Parenting Coordination may be sustainable without a specific authorizing rule or statute.

E. Other Statutes as Basis for Authority or Providing Analogous Support for the Authority to Appoint a Parenting Coordinator

A state might have some other statute or court rule allowing a third-party judicial designee that could provide the basis for the appointment of a Parenting Coordinator. For example, Kentucky does not have a statute specifically providing for the appointment of a Parenting Coordinator. However, a court identified as one possible source for the authority to appoint a Parenting Coordinator a statute that grants the trial court's authority to order a local child welfare department, for example, to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out.⁷⁰

Similarly, New York has allowed appointment of a Parenting Coordinator under a court's authority to appoint a "case manager," although the Parenting Coordinator cannot

delegating that authority would deprive the trial court of its statutorily mandated authority to determine issues of child custody and visitation time). *But see* Polacek v. Polacek, 222 P.3d 732 (Or. Ct. App. 2009) (allowing delegation of decision-making authority to a Parenting Coordinator post-*Heinonen* where the trial court would subsequently review that decision).

⁷⁰*Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. April 2, 2010). The statute allows such an appointment "[i]f both parents or all contestants agree to the order, or if the court finds that in the absence of the order the child's physical health would be endangered or his emotional development significantly impaired."

make decisions.⁷¹ New Jersey has allowed appointment of a Parenting Coordinator under the court's authority to appoint an expert to assist the court in making decisions, although such a Parenting Coordinator could not make decisions.⁷²

⁷¹ In New York, which does not have a Parenting Coordination statute, it has been held that allowing a Parenting Coordinator to make decisions is an improper delegation of judicial authority, but that a Parenting Coordinator without decision-making authority may be appointed. *Edwards v. Rothschild*, 60 A.D.3d 675 (N.Y. 2009) (relying on cases that have held that it is improper to condition future visitation on the recommendation of a mental health professional or to allow a child's treating clinician to decide future custody issues); *see also* *L.S. v. L.F.*, 803 N.Y.S.2d 881 (N.Y. App. Div. 2005) (taking the "unusual step" of appointing a Parenting Coordinator and granting no decision-making authority to the Parenting Coordinator but appointing him to assist the parties in re-establishing visitation between the child and his father) (citing *Zafran v. Zafran*, 761 N.Y.S.2d 317 (N.Y. App. Div. 2003) (holding that it was not an improper delegation of judicial authority to appoint a "case manager," which has no decision-making authority)).

⁷² *Lindsley v. Lindsley*, No. 2006 WL 157316 (N.J. Super. Ct. App. Div. Jan. 23, 2006). The husband argued that the use of a Parenting Coordinator was an impermissible delegation of judicial authority. *Id.* at *6. The court decided, however, that the appointment of the Parenting Coordinator was the appointment of an expert provided for by New Jersey court rules. *Id.* The court recognized that a court was not to abdicate its decision-making role to an expert but held that it was clear that the trial court did not cede his authority to the expert; instead, he relied on the expert's report and had carefully defined the expert's role and preserved the court's role as the ultimate decision-maker in the case. *Id.* at *7. The trial judge had said:

the [Parenting Coordinator] will offer you a recommendation, not a decision. And you can agree with it, resolve it, it's done. Or one of you can say, we didn't like that, we're going to the judge . . . I'm not abdicating my decision-making authority to that person, but I'm giving him an opportunity to funnel through your dispute as parents without involving me, who wears this black dress.

Id. at *1.

Not all courts agree, of course, that a statute other than a Parenting Coordinator statute can allow for the appointment.⁷³ Moreover, where another statute is relied upon as the basis for the appointment, the Parenting Coordinator should adhere to the procedures and requirements of that statute, which may not be consistent with the goals and procedures of Parenting Coordination.⁷⁴

A more sound approach might be that taken by the Superior Court of Pennsylvania, which determined that allowing a Parenting Coordinator to make decisions about issues that are “ancillary” to the trial court’s order was not an improper delegation of judicial authority.⁷⁵ Although

⁷³ *Heinonen v. Heinonen*, 14 P.3d 96 (Or. Ct. App. 2000). The court in *Heinonen* recognized the statutory authority for the trial court to use services of a psychologist or a mental health expert to evaluate parenting time requests, OR. REV. STAT. ANN. § 107.425 (West 2010), and to modify parenting time provisions by stipulation subject to the court discretion to hold a hearing, OR. REV. STAT. ANN. § 107.174 (West 2010), and that the statutes provide for an expedited procedure to resolve disputes, OR. REV. STAT. ANN. § 107.425 (West 2010). 14 P.3d at 98-99. However, the court rejected any idea that what the trial court had done in *Heinonen* fell within the ambit of any of those statutes. *Id.*

⁷⁴ See *supra* Parts IV.A., B., and C.

⁷⁵ *Yates v. Yates*, 963 A.2d 535, 540 (Pa. Super. Ct. 2008). The Pennsylvania Superior Court also noted that at least one Pennsylvania County had adopted local rules authorizing appointing of a Parenting Coordinator and setting out the role of a Parenting Coordinator. It also noted that the Pennsylvania Supreme Court Domestic Relationships Procedural Rules Committee was considering a proposed Rule of Civil Procedure and a model order to unify parenting coordination procedures across the statute of Pennsylvania. *Id.* at 539 n.2. *Yates* has been cited by the Maryland Court of Special Appeals as instructive in that court’s decision that a trial court’s delegation of authority to a third party to oversee family therapy was not improper. *Meyr v. Meyr*, 7 A.3d 125, 139-140 (Md. Ct. Spec. App. 2010). Because the trial court had resolved the primary issues regarding custody and visitation and the third-party’s role involved “merely the coordination of family therapy,” which the court viewed as “ancillary” to custody and visitation, it determined that the trial court had not improperly delegated its judicial authority. *Id.*

authority for the appointment of a special master and a hearing officer did not provide the authority for the appointment of a Parenting Coordinator, those provisions were at least *precedent for the “limited” delegation* of judicial authority.⁷⁶

As the Pennsylvania court recognized, the delegation of authority to a Parenting Coordinator is a “limited” delegation, and there is undoubtedly precedent in any jurisdiction for some limited delegation of some tasks related to a judge’s disposition of his duties. That rationale – that the role of a Parenting Coordinator is limited and there is analogous authority for a limitation delegation of judicial authority – combined with the idea that the court does have some *parens patriae* authority to protect the best interest of the children and to enforce its own orders, provides a valid argument that Parenting Coordination is sustainable without a specific statute or court rule authorizing the appointment.⁷⁷ Where a trial court has some inherent authority to ensure the best interest of the children, with or without specific statute or rule-based authority, Parenting Coordination can be sustained. Combined with the substantial benefits of a qualified Parenting Coordinator, imposing appropriate limitations on the Parenting Coordinator’s role can incrementally diminish the argument that appointment is an improper delegation of

⁷⁶ *Yates*, 963 A.2d at 541.

⁷⁷ It might be argued that the role is narrow enough that the Parenting Coordinator’s role is merely ministerial and not judicial. In deciding whether an improper judicial delegation has occurred in different contexts, courts have focused on whether the action delegated involved a “judicial function” or the “ultimate decision-making authority,” or involved merely ministerial matters or “details.” *See, e.g., United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001) (holding that the delegation of the details of court-ordered therapy, including choosing a provider and schedule, was permissible); *United States v. Grant*, 52 F.3d 448, 451 (2d Cir. 1995) (holding that the trial judge did not delegate a judicial function by directing the jury to tell the reporter to go faster or slower as the jury listened to testimony read-backs).

judicial authority. Achieving an appropriate balance of benefits and limitations is discussed in light of the basis for appointment authority, which achieves a sustainable appointment. The benefits and limitations are discussed in the remainder of this Article.

V. The Benefits of Parenting Coordination in High-Conflict Cases

Unlike a judgment in almost every other kind of litigation, a divorce judgment is written at a specific point in time and attempts to address the relationship of the parties at that specific point in time and in the future. However, that relationship is not static; it changes.⁷⁸ Ideally, a parenting plan would specify in detail the terms governing the post-divorce relationship, such as the visitation schedule, so as to avoid opportunities for frequent conflict. However, often times a parenting plan is not sufficiently specific, thus allowing for frequent opportunities for conflict.⁷⁹ Furthermore, for divorced couples who have not developed the ability to resolve

⁷⁸ Kelm v. Kelm, 749 N.E.2d 299, 304 (Ohio 2001) (“[A]s a practical matter, a custody and visitation order is never absolutely final.”).

⁷⁹ Linda D. Elrod, *A Minnesota Comparative Family Law Symposium: Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL. L. REV. 495, 529-30 (2001) (“Highly structured parenting plans that help parents disengage may be valuable tools to deal with high-conflict parents. A lengthy and detailed parenting plan gives less room for each parent to manipulate or feel the other parent is manipulating them.”). It has been suggested that a Parenting Coordinator assist in the process of drafting such a detailed parenting plan. See, e.g., Cassandra Brown, *Ameliorating the Effects of Divorce on Children*, 22 J. AM. ACAD. MATRIM. LAW 461, 478 (2009) (suggesting that a Parenting Coordinator could add “increased structure and detail in the parenting plan”) (citing Coates et al., *supra* note 3, at 249-250). Such a role, however, is not consistent with the typical Parenting Coordinator’s role which arises after a court order is entered. See *infra* Part VII.

conflict between them, even a parenting plan with intricate details cannot eliminate all possibility of conflict. Even the most detailed parenting plan cannot contemplate every situation that will arise: children's ages, interests and activities change over time, and parents may remarry and relocate. A parenting plan that appeared to contemplate and address every opportunity for conflict when the children were three and five years old will not necessarily contemplate and resolve every conflict that will arise when those same children are thirteen and fifteen years old.

Parenting Coordination is intended for high-conflict divorced parents – those who otherwise would repeatedly be in court seeking intervention in their daily lives. If the divorced parents do not have the ability to resolve the conflicts that arise during that period, they will frequently be back in court. These high-conflict parents use a disproportionate amount of the court's time and resources.⁸⁰

While Parenting Coordinators address what may be perceived as minor conflicts between the parents,⁸¹ depending on whether and how these conflicts are resolved,

⁸⁰ Coates et al., *supra* note 3, at 246-47; *see also* Wilma J. Henry et al., *Parenting Coordination and Court Relitigation: A Case Study*, 47 FAM. CT. REV. 682, 682-83 (October 2009) (stating that family courts and associated professionals spend approximately 90 percent of their time on about 10 percent of parents).

⁸¹ Coates et al., *supra* note 3, at 247 (noting that disputes between high-conflict parents are often minor, involving such things as one-time changes in a visitation schedule, telephone access, and vacation planning). *See also infra* Part VII, discussing that, properly utilized, Parenting Coordinator will encompass only assisting the parties in implementing a well-drafted, detailed parenting plan that has been incorporated into a court order and will, thus, address only minor issues. Parenting Coordinators should be involved when the rights at stake are relatively insignificant in comparison to a right such as the right to custody or visitation in toto. If Parenting Coordinators are being used in a different capacity the balance maybe tipped against granting decision-making authority to the Parenting Coordinator. However, such is not the proper role of a Parenting Coordinator.

the conflicts can have a major impact on the children of those parents. The level and intensity of the parental conflict prior, during, and after divorce proceedings, rather than the divorce itself, is thought to be the most dominant factor in a child's psychological and social adjustment post-divorce.⁸² Exposure to conflict can result in problems such as perpetual emotional turmoil, depression, substance abuse, and educational failure.⁸³ Thus, it is imperative to avoid even those conflicts regarding minor issues, and implement mechanisms of resolving those conflicts amenable. However, the typical mechanism for resolving conflict – the adversarial process of our court system – encourages combat and discourages cooperation.⁸⁴

⁸² See, e.g., Elrod, *supra* note 79, at 497; see generally John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 99 (2005).

⁸³ Elrod, *supra* note 79; see generally Grych, *supra* note 82.

⁸⁴ See, e.g., Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 131 (2002) ("It has long been noted that the adversarial divorce process exacerbates the conditions that create risk for children, and often undermines parental efforts to maintain protective conditions for children after separation.") (citing JANET R. JOHNSTON & LINDA G. CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* 38-44 (1988)). Kelly explains the failings of the adversarial process:

The central failings of the adversarial process with respect to custody disputes are the inherent mechanisms and practices that escalate conflict, diminish the possibility of civility between parents, exacerbate the win-lose atmosphere that encourages bitterness and parental irresponsibility, and weaken important parent-child relationships. The basic nature of the adversarial process pits parents against each other, encourages polarized and positional thinking about each other's deficiencies, and discourages parental communication, cooperation, and more

In response to the detrimental effects of the adversarial process and parental conflict, multiple means of alternative dispute resolution have developed, such as mediation and arbitration of child custody cases. Parenting Coordination, however, is different from other alternative means of dispute resolution; it looks to the future beyond the instant conflict.⁸⁵ In addition to addressing the instant conflict between the parents, Parenting Coordination further seeks to avoid future conflict. Parenting Coordination sets out to *teach* the parents to make decisions and resolve conflicts among themselves.⁸⁶ This “teaching”⁸⁷ component of Parenting Coordination separates Parenting Coordination from other alternative dispute resolution processes. It provides benefits that other alternative dispute resolution processes do not to the court

mature thinking about children's needs at a critical time of change and upheaval. Possible future constructive relationships between parents are often thus destroyed.

Kelly, *Psychological and Legal Interventions*, 10 VA. J. SOC. POL'Y & L. at 131.

⁸⁵ Other differences between Parenting Coordination and familiar alternative dispute resolution processes are discussed further in Parts IV.A, B., and C above.

⁸⁶ Kirkland, *Positive Coping*, *supra* note 15, at 62 (“Parenting coordinators attempt to teach divorced parents how to function independently of the court to resolve conflicts and implement their own parenting plans.”); Shear, *supra* note 16, at 90 (explaining that Parenting Coordination incorporates elements of “parent education and coaching, mediation, arbitration, judicial reference and child custody evaluation”); Greenberg, *supra* note 15, at 208 (cleverly using in this context the Chinese proverb: “Give a man a fish and he will eat for a day. But, teach him to fish, he will eat for a lifetime.”).

⁸⁷ In interviews with Parenting Coordinators in North Carolina, most Parenting Coordinators agreed that their primary issue is making clear to the parents the effect that their ongoing conflict would have on the children. Sherrill W. Hayes, “*More of a Street Cop than a Detective*”: *an Analysis of the Roles and Functions of Parenting Coordinators in North Carolina*, 48 FAM. CT. REV. 698, 702 (October 2010).

system, the children of divorce, and the high-conflict parents.

Parenting Coordination also provides a benefit to the court system. With the proper utilization of Parenting Coordination, the court system does not become what it otherwise would – a type of social service agency.⁸⁸ In the short term, the Parenting Coordinator will assist the parties in mutually resolving a given conflict, or making a decision that will resolve the instant conflict. Thus, the parties will not appear before the court for the given conflict.

Secondly, there are longer-term benefits to Parenting Coordination. Ideally, throughout the course of working with the Parenting Coordinator, the parents will develop the skills and abilities to resolve conflicts on their own. This in turn reduces the need to resort to the judiciary – or even a Parenting Coordinator – when future conflicts arise. A study on the effectiveness of Parenting Coordination determined that, after the appointment of Parenting Coordinators in high-conflict cases, there was a “near 25-fold” decrease in court appearances in those cases.⁸⁹ A more recent study indicated a reduction of

⁸⁸ See Dana E. Prescott, *When Co-Parenting Falters: Parenting Coordinators, Parents-in-Conflict, and the Delegation of Judicial Authority*, 20 ME. B.J. 240, 243 (2005) (stating that because “courts will continue to be the vessel into which all this chaos is poured,” “courts will evolve as more of a social service agency th[a]n a separate constitutional branch of government charged with the issuance of judgments within the traditional boundaries of the law”).

⁸⁹ Psychologist and Parenting Coordinator, Terry Johnston, Ph.D., analyzed 166 cases over a two-year period. AFCC, *Implementation Issues*, *supra* note 3, at 534 (citing Johnston, T., *Cost Effectiveness of Special Master Use*, unpublished report, 1994). In the year before appointment of a Parenting Coordinator, those 166 cases had 993 court appearances among them, an average of six court appearances per case. *Id.* In contrast, in the year after appointment, those cases had only thirty-seven court appearances among them, an average of .22 court appearances per case. *Id.*; see also Elizabeth Kruse, ADR, Technology, and New Court Rules – Family Law Trends for the Twenty-First Century, 21 J. AM. ACAD. MATRIMONIAL LAW, 207, 217 (2008) (citing

approximately seventy-five percent of child-related court filings after Parenting Coordination was implemented.⁹⁰

Parenting Coordination also benefits the children of divorced parents. The use of a Parenting Coordinator can allow for a more harmonious – or at least a less hostile – environment for the children. If parents proceed to deal with conflicts on their own by hiring their own attorneys and resolving disputes in the adversarial system, it becomes unlikely that they will develop the skills and abilities to resolve the conflict on their own. In the meantime, that litigious environment in the respective households is not in the best interest of the children; it is in the best interest of the children for their parents to be able to amicably resolve conflicts as they arise.⁹¹

Parenting Coordination also benefits high-conflict parents. As a purely practical matter, when small post-divorce conflicts arise between parents, the parents need a speedy resolution. They often cannot get in front of the court soon enough to meaningfully resolve the conflict. A Parenting Coordinator is much more easily accessible than a judge. A Parenting Coordinator can help the parties to make decisions expeditiously or quickly make a decision when the parties are unable to do so.⁹² For example, assume

Johnston's study as evidence that Parenting Coordination is an effective tool for reducing repeat litigation among parents).

⁹⁰ Henry et al., *supra* note 80, at 682.

⁹¹ See discussion *infra* Part V regarding the detrimental effects on children of post-divorce conflict. At least some courts take the same view. See, e.g., Cichocki v. Mazurek-Smith, 8 Pa. D. & C. 5th 361, 377 (2009) ("Hopefully, the [Parenting Coordinator] will be able to facilitate the interaction of the parties. Beyond that, this court believes that co-parenting counseling is imperative. The parties need to begin to understand the other's point of view, which will hopefully soften their stance against each other and benefit the minor child.") (footnote omitted).

⁹² Shear, *supra* note 16, at 91 (parents using Parenting Coordination "trade off one set of risks and benefits for another – giving up formal rights and guarantees of fair play and accountability for informality,

that a parenting plan prescribes that the father shall have visitation with the children on alternating weekends. The same parenting plan also provides that the mother shall have the children on Mother's Day weekend. The parenting plan, however, does not address what will happen when there is a conflict between alternating weekend visitation and Mother's Day weekend visitations. Four weeks from Mother's Day weekend, the parents realize there is a conflict and are unable to resolve it. The likelihood of presenting the issue to the court before Mother's Day is slim. However, the Parenting Coordinator is available much sooner.⁹³ Ideally, he can help the parties reach a mutual decision. If not, he may⁹⁴ be able to make a decision. Either way, the matter is resolved in a timely manner. The parents also benefit from the process in that the Parenting Coordinator can equip them with the ability to resolve future conflicts on their own.

Ideally, the Parenting Coordination process will also be less expensive for the parents than resolving their disputes in the adversarial system by hiring an attorney. If parents seek to resolve their dispute in the adversarial environment of the court, they would each be paying their own attorneys. Furthermore, by using the adversarial system rather than a Parenting Coordinator, they would be more likely to return to court again and again, paying their lawyers again and again.⁹⁵ Of course, where the Parenting

quick decisions, and a decision-maker who has substantial experience in child custody issues, and incremental decision-making").

⁹³ See Hayes, *supra* note 87, at 699 (one of the three major roles identified in interviews with Parenting Coordinators in North Carolina was resolving issues in a timely manner).

⁹⁴ Whether the Parenting Coordinator has decision-making authority depends upon the terms of the appointment and any governing Parenting Coordination statute or court rule in the jurisdiction.

⁹⁵ See *supra* note 89 (discussing study that showed that parents using Parenting Coordination returned to court an average of only .22 times a year, as compared to six times a year without use of Parenting Coordination).

Coordinator does not have decision-making authority but is simply a “hoop” through which the parties must jump before getting before the court,⁹⁶ with their lawyers in tow, this does not hold true.

Thus, some of the practical benefits of Parenting Coordination are eroded if the Parenting Coordinator does not have decision-making authority. Consider the above hypothetical. If the Parenting Coordinator does not have decision-making authority and the parties are unable to reach a mutual decision about who has the children on Mother’s Day weekend, the parties will have to resort to court. Thus, (1) the court is left to resolve the conflict; (2) more time has passed, making it even less likely that the parties will get before the court in time for the court to meaningfully resolve the conflict; (3) the children have possibly been exposed to conflict; (4) the parties’ acrimony has increased; and (5) their expenses have been duplicated.

There are, nevertheless, some benefits of Parenting Coordination even when the Parenting Coordinator does not have decision-making authority. Merely recommending solutions when the parties encounter conflict will help the parties resolve the immediate problem. Furthermore, it will help the parties to develop guidelines and strategies that will help them to avoid similar problems in the future⁹⁷ and further to develop strategies to avoid future conflict.⁹⁸ However, the substantive benefits that justify Parenting

⁹⁶ This is the result if the Parenting Coordinator does not have decision-making authority; thus, this Article recommends Parenting Coordination with decision-making authority.

⁹⁷ *In re Marriage of Rozzi*, 190 P.3d 815, 821 (Colo. Ct. App. 2008) (discussing the provision of Colorado’s code that allows for appointment but does not provide the Parenting Coordinator with decision-making authority and noting that having a Parenting Coordinator merely assisting the parties in resolving current and future conflict was the legislative intent in passing the Parenting Coordination statute).

⁹⁸ *Id.*

Coordination are even greater when the Parenting Coordinator has decision-making authority.⁹⁹

VI. Parenting Coordination Qualifications: Vital to Benefit Realization

As discussed in Part V above, one of the primary benefits of Parenting Coordination is that it provides high-conflict parents with the skills to avoid or resolve future conflicts on their own. Thus, for Parenting Coordination to bestow its full benefits on its intended beneficiaries, the Parenting Coordinator must be qualified to equip the parents with those skills. Without a qualified Parenting Coordinator, the benefits of Parenting Coordination erode. Parenting Coordination is a “legal-psychological hybrid.”¹⁰⁰ Thus, a Parenting Coordinator must have adequate training in both areas.

The AFCC Task Force on Parenting Coordination requires that a Parenting Coordinator have “training and experience in family mediation” and that the Parenting Coordinator be certified as a mediator in his jurisdiction if certification is available.¹⁰¹ In addition, the Parenting Coordinator shall be either (1) a licensed mental health professional, (2) a legal professional in an area relating to families, or (3) a certified family mediator under the rules or laws of the jurisdiction with a master's degree in a mental health field.¹⁰² Furthermore, the Parenting

⁹⁹ Shear, *supra* note 16, at 90 n.4 (stating that, although the AFCC Guidelines treat decision-making authority as an optional component of Parenting Coordination, California’s family court community, who has experimented with Parenting Coordination for more than a decade, has seen Parenting Coordination decision-making authority as “essential to deterring re-litigation”).

¹⁰⁰ Kirkland & Sullivan, *supra* note 2, at 633; Sullivan, *supra* note 2, at 576.

¹⁰¹ AFCC, *Guidelines supra* note 9, at 166.

¹⁰² *Id.*

Coordinator should have “extensive practical experience in the profession with high conflict or litigating parents” and “training in the parenting coordination process, family dynamics in separation and divorce, parenting coordination techniques, domestic violence and child maltreatment, and court specific parenting coordination procedures.”¹⁰³

Parenting Coordination has been described as “practicing at the interface of the legal/psychological fields.”¹⁰⁴ Without requirements that a Parenting Coordinator have the education, training, and skills to practice at this interface, the benefits of Parenting Coordination erode. Where the benefits that can be bestowed by a properly qualified Parenting Coordinator are eroded, so does the justification for allowing such a third party to intrude into the family in conjunction with their family court litigation. Yet the qualifications required by various jurisdictions vary.¹⁰⁵

The delegation of judicial authority is a “serious issue” and the courts should therefore delegate its authority – to the degree permissible – only to qualified professionals.¹⁰⁶ Any rationale for Parenting Coordination offered in this Article deteriorates if the Parenting Coordinator appointed is not adequately qualified: the

¹⁰³ The AFCC Guidelines also provide that the Parenting Coordinator shall “acquire and maintain professional competence in the parenting coordination process” by regularly participating in educational activities promoting professional growth. *Id.* Rather idealistically, the Guidelines provide that a Parenting Coordinator “shall decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the Parenting Coordinator’s skill or expertise.” *Id.*

¹⁰⁴ Sullivan, *supra* note 2, at 581.

¹⁰⁵ AFCC, *Implementation Issues*, *supra* note 3, at 552 (“some require[] possession of a social science or mental health degree; others provide[] that paraprofessionals, such as a court staff, could fulfill the function provided adequate training was had;” “[i]n many jurisdictions, attorneys serve as PCs”).

¹⁰⁶ AFCC, *Guidelines*, *supra* note 9, at 165.

teaching (or counseling) component of Parenting Coordination is what tips the balance in favor of Parenting Coordination, because that teaching (or counseling) component is what broadcasts the benefits of Parenting Coordination into the future. That component is also what the judges, mediators, arbitrators, and special masters cannot provide. The Parenting Coordinator's ability to provide benefits are a significant part of the equation: benefits of Parenting Coordination combined with limitations on Parenting Coordination overcome the arguments against Parenting Coordination considered in this Article.

VII. Limitation on Parenting Coordination: Stage of Divorce Litigation

May a Parenting Coordinator be appointed (1) immediately upon the commencement of a divorce proceeding, (2) after a court has entered a pendente lite order establishing visitation during the pendency of the divorce proceeding, or (3) only after a court has entered a judgment of divorce that includes a final custody determination and a parenting plan? When a parent, post-divorce, petitions the court for modification of the previously-entered parenting plan, may a court immediately appoint a Parenting Coordinator, appoint a Parenting Coordinator after entering a pendent lite order on the modification petition, or appoint a Parenting Coordinator only after the court has entered a judgment on the modification petition? Limiting the appointment to only after the trial court has entered an order, and thus limiting the Parenting Coordinator's role to implementing the pre-existing court order, weakens arguments that Parenting Coordination is an improper delegation of judicial authority.

The AFCC Task Force's Guidelines indicate that Parenting Coordination is proper only when there is already

a parenting plan or court-ordered custody and visitation arrangement in place.¹⁰⁷ Parenting Coordination should be limited to addressing compliance with an already-existing court order. Where conflicts arise, the Parenting Coordinator should first assist the parties in reaching an agreement and, if they cannot, make a decision that is consistent with the already-existing court order.¹⁰⁸ Thus, the Parenting Coordinator is not truly free to take independent action that might be strictly within the province of the judiciary; instead, he is bound by the terms of the order that the court has already entered and assists the parties in their attempt to comply with the court order.¹⁰⁹ For those reasons, appropriately timing the Parenting Coordinator's appointment strips a layer from the argument that Parenting Coordination is an improper delegation of judicial authority.

Many states do not allow Parenting Coordination until a court has already entered an order to guide the Parenting Coordinator in his mission. In Oklahoma, which has operated under enabling legislation longer than any other state, the Parenting Coordination Act contemplates

¹⁰⁷ The Task Force defines Parenting Coordination as assisting "high-conflict parents to implement their parenting plan. . . ." AFCC, *Guidelines*, *supra* note 9, at 165. It describes the objective of Parenting Coordination as to "assist high-conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, health and meaningful parent-child relationships." *Id.*

¹⁰⁸ *Id.* at 171 (Guideline XI, stating that "A PC should attempt to facilitate agreement between the parties in a timely manner on all disputes regarding their children as they arise. When parents are unable to reach agreement, and if it has been ordered by the court, or authorized by consent, the PC shall decide the disputed issues.").

¹⁰⁹ *Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 *5 (Ky. Ct. App. April 2, 2010) (holding that Parenting Coordination was not an improper delegation of judicial authority because, among other reasons, the trial court was "simply supervising the court's orders" to ensure that the terms of its orders are carried out.).

that a Parenting Coordinator will be appointed only after a court order is in place – either pendente lite or final – and that the Parenting Coordinator will assist in implementation of that already-existing order or judgment.¹¹⁰ Specifically, the Act limits a Parenting Coordinator’s authority to “matters that aid the parties in,” among other things, “complying with the court’s order of custody, visitation, or guardianship.”¹¹¹ Given that the Parenting Coordinator’s decision-making authority is limited to those things that will aid the parties in complying with orders that are already entered, the statute does not indicate that a Parenting Coordinator has a role when no orders have been entered.¹¹²

¹¹⁰ See OKLA. STAT. ANN. tit. 43, § 120.3 (West 2010).

¹¹¹ *Id.*

¹¹² A pioneer of the Parenting Coordinator movement in Oklahoma seems to interpret the statute differently but nevertheless concludes that best practice would be to have a parenting plan in place before a Parenting Coordinator is appointed. See Barbara Ann Bartlett, *Parenting Coordination: A New Tool for Assisting High-Conflict Families*, 15 OKLA. B. J. 453, 454 (2004) (available at http://www.okbar.org/obj/articles_04/021404.htm). This author, however, contends that it is not only “best practice,” but necessary under the statutory scheme. Consistent with that interpretation of the statute, the Oklahoma Court of Civil Appeals has stated that the “plain language of the Act clearly limits the power and authority of a PC to ‘aid’ in the ‘enforcement of the court’s order of custody.’” *Fultz v. Smith*, 97 P.3d 651, 654 (Okla. Civ. App. 2004). Although the court did not specifically state that the appointment of a Parenting Coordinator *cannot* be made before the trial court has entered an order, it reveals that such an appointment is not workable. If the Parenting Coordinator’s authority is limited to “aid” in enforcement of the court’s order, what decisions is the Parenting Coordinator to make in a situation where no order exists? Even in a modification proceeding where some order has been entered – the judgment of the initial divorce proceeding, such as in *Fultz*, the trial court’s appointment of a Parenting Coordinator is pointless if his role is limited to “aiding” in the enforcement of a court order because the focus of that litigation is modify that very order.

The Colorado Parenting Coordinator statute more specifically indicates that a Parenting Coordinator's appointment is proper only after the trial court has entered an order.¹¹³ It provides that a court may appoint a Parenting Coordinator "at any time after the entry of an order concerning parental responsibilities and upon notice to the parties."¹¹⁴ Idaho,¹¹⁵ Louisiana,¹¹⁶ and Vermont¹¹⁷ likewise allow the appointment of a Parenting Coordinator only after the court has entered an order establishing custody.

Some states do allow appointment of a Parenting Coordinator prior to the court entering an order. For example, Florida allows appoints a Parenting Coordinator

¹¹³ COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010) (stating that "*at any time after the entry of an order* concerning parental responsibilities and upon notice to the parties, the court may . . . appoint a parenting coordinator. . . .") (emphasis added); COLO. REV. STAT. ANN. § 14-10-128.3 (West 2010) (stating that, in addition to the appointment of a parenting coordinator, a court may "*at any time after the entry of an order* concerning parental responsibilities . . . the court may appoint a qualified domestic relations decision-maker. . . .") (emphasis added). See also AFCC, *Implementation Issues*, *supra* note 3, at 540 ("PCs are generally used in Colorado in post-decree high conflict parenting situations where communication has been difficult and litigation ongoing.").

¹¹⁴ COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010).

¹¹⁵ IDAHO R. CIV. P. 16(I)(3) ("The appointment may be made at any stage in the proceeding *after entry of an order, decree, or judgment* establishing child custody.") (emphasis added).

¹¹⁶ LA. REV. STAT. ANN. § 9:358:1(A) (2010) ("[T]he court may appoint a parenting coordinator in a child custody case for good cause shown *if the court has previously entered a judgment establishing child custody*, other than an ex parte order.") (emphasis added). The purpose of the limitation is to "prevent the court from using the parenting coordinator process as a means of abdicating its responsibility to make the initial custody determination." *Griffith v. Latiolais*, 32 So. 3d 380, 398 (La. Ct. App. 2010) (citing comments to the statute).

¹¹⁷ V.R.F.P. 4(s) (allowing a court to appoint a Parenting Coordinator "[i]n an action under this rule in which parental rights and responsibilities *have been adjudicated*") (emphasis added).

“where an order is sought or entered.”¹¹⁸ Florida allows the Parenting Coordinator to assist the parties in creating and implementing the parenting plan.¹¹⁹ Oregon also appears to allow appointment prior to entry of a court order by allowing a Parenting Coordinator to assist the parties in creating and implementing a parenting plan.¹²⁰ Arizona’s rule is the same.¹²¹ North Carolina only permits the appointment before an order has been entered with consent of the parties;¹²² without the parties consent, a Parenting Coordinator can be appointed only after a custody order or parenting plan has been entered.¹²³ In California, which has operated without any enabling legislation for over sixteen years,¹²⁴ although the appointment of a Parenting Coordinator typically occurs after a parenting plan has been put in place, it has been reported that Parenting Coordinators are sometimes appointed to manage the case during its pendency, due to the lengthy period of time required to reach a court decision in high-conflict cases.¹²⁵

¹¹⁸ FLA. STAT. ANN. § 61-125 (West 2010).

¹¹⁹ *Id.*; see also *supra* note 86 referring to Parenting Coordinators assisting in drafting of parenting plans.

¹²⁰ OR. REV. STAT. ANN. § 107.425(3)(a) (West 2010).

¹²¹ ARIZ. R. FAM. L. PROC. 74(G) (allowing appointment “[p]rior to, simultaneously with, or after entry of a decree, judgment or custody or parenting time order”).

¹²² N.C. GEN. STAT. ANN. § 50-91 (West 2010) (“The court may appoint a parenting coordinator *at any time during the proceedings* of a child custody action involving minor children . . . *if all parties consent to the appointment.*”) (emphasis added).

¹²³ N.C. GEN. STAT. ANN. § 50-91 (West 2010) (“The court may appoint a parenting coordinator *without the consent* of the parties *upon entry of a custody order other than an ex parte order, or upon entry of a parenting plan* only if the court also makes specific findings. . . .”) (emphasis added). See *infra* Part VIII for a discussion of the findings a court must make to appoint a Parenting Coordinator without consent.

¹²⁴ Shear, *supra* note 16, at 90.

¹²⁵ AFCC, *Implementation Issues*, *supra* note 3, at 540. A child custody evaluator is sometimes appointed along with the Parenting Coordinator. See also *Lindsley v. Lindsley*, 2006 WL 157316 (N.J. Super. Ct. App.

Although some jurisdictions allow for appointment prior to the entry of a court order, in its typical form, Parenting Coordination comes after the trial court has entered an order and a Parenting Coordinator assists the parties in complying with and implementing the parenting plan.¹²⁶ Significantly, confining the appointment to that point in time – only after the trial court has entered an order – and limiting the Parenting Coordinator’s role to implementing the pre-existing court order, while counseling and educating along the way, allows Parenting Coordination to address the problems that it was created to remedy and protects against arguments that Parenting Coordination is an delegation of judicial authority.¹²⁷ Thus, the appointment is more likely to be sustained if the appointment is made after the entry of a trial court’s order.

VIII. Limitations on Parenting Coordination: Conditions Precedent to Appointment

The conditions precedent to appointment are relevant in considering whether the appointment of a Parenting Coordinator is an improper delegation of judicial authority. Relevant conditions precedent to be discussed

Div. Jan. 23, 2006), referring to the appointment of a Parenting Coordinator whose role came into play before the parties were divorced and who worked with the parties to facilitate settlement of their divorce and made a report to the court on which the court relied to make its custody determination.

¹²⁶ See AFCC’s definition of Parenting Coordinator, *supra* note 8; see also Hayes, *supra* note 87, at 699 (two of the three major roles identified in interviews with Parenting Coordinators in North Carolina were implementation of the existing plan and compliance with the existing plan).

¹²⁷ While having someone assist the parties *during the litigation* work through their disagreements and assist the parties in drafting a mutually acceptable and detailed parenting plan certainly has value, that is not Parenting Coordination in its classic form, see *id.*, and, thus, is not the “Parenting Coordination” that this Article addresses.

here are consent to the appointment and trial court findings.¹²⁸ Where the parties consent to the appointment, their later grounds for objection to the appointment is not well-founded.¹²⁹ Even where parties do not consent to the appointment, if the trial court has made specific findings to justify the appointment – such as a finding that the parents are in high conflict or that the appointment of the Parenting Coordinator is in the best interest of the children – the additional “intrusion” into the family by appointment of the Parenting Coordinator may be justified.

The Guidelines of the AFCC Task Force on Parenting Coordination require that a Parenting Coordinator serve only by court order or with consent of the parties.¹³⁰ The Guidelines indicate that appointment is proper when the parents are “high conflict.”¹³¹ Although the Guidelines do not specifically define “high conflict,” they describe the Parenting Coordinator’s role as “most frequently reserved for those high-conflict parents who have demonstrated their longer-term inability or

¹²⁸ Some states make ability to pay a statutory condition precedent to the appointment of a Parenting Coordinator. *See, e.g.*, OKLA. STAT. ANN. tit. 43, § 120.5 (West 2010); N.C. GEN. STAT. ANN. § 50-91(b) (West 2010). The requirement that only children of parents with the ability to pay are to benefit from Parenting Coordination weakens the argument that part of the justification for a Parenting Coordinator’s “intrusion” into the family is the state’s obligation to ensure the best interest of the children, *see supra* Part IV.D. Some states also consider evidence of domestic violence in determining whether Parenting Coordination is appropriate. *Compare* COLO. REV. STAT. ANN. § 14-10-128.1(2)(b) (West 2010), and *In re Marriage of Rozzi*, 190 P.3d 815, 819 (Colo. Ct. App. 2008) (indicating that evidence of domestic violence could render Parenting Coordination inappropriate) with IDAHO R. CIV. P. 16(l) (indicating that evidence of domestic violence, as well as mental illness of chemical dependence, make Parenting Coordination a viable option).

¹²⁹ It may be, however, in a jurisdiction that prohibits arbitration of child custody matters. *See* discussion at Part IV.C.

¹³⁰ AFCC, *Guidelines*, *supra* note 9, at 169.

¹³¹ *Id.* at 165.

unwillingness to make parenting decision on their own, to comply with parenting agreements or orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict.”¹³² Most Parenting Coordination statutes are substantively in line with the recommendations of the AFCC, requiring either consent or trial court findings as precedent to an appointment.

Typically, a Parenting Coordinator may be appointed where both parents consent to such appointment. In all states with a Parenting Coordination statute, a court may appoint a Parenting Coordinator even without the consent of both parties. However, in all but one¹³³ the court must first make some specific findings that warrant the appointment of the Parenting Coordinator. The findings required vary among the states. However, they are similar in that they all contemplate appointment of a Parenting Coordinator when, contrary to the best interests of the children involved, those children will be exposed to persistent post-divorce parental conflict without the appointment. Allowing the appointment of a Parenting Coordinator only in those circumstances and when the

¹³² *Id.*

¹³³ Florida is the exception. Florida’s Parenting Coordination statute is significantly less restrictive than others in that it authorizes appointment of the Parenting Coordinator on the court’s motion – that is, without the parties’ consent – yet does not set forth any specific findings that the trial court must make in order to justify the appointment without consent of the parties. FLA. STAT. ANN. § 61-125 (West 2010) (“[U]pon agreement of the parties, the court’s own motion, or the motion of a party, the court may appoint a parenting coordinator and refer the parties to parenting coordination to assist in the resolution of disputes concerning their parenting plan.”). Florida’s statute became effective on October 1, 2009. Thus, it has not yet been addressed by a Florida appellate court. Allowing appointment without consent or some findings renders the appointment vulnerable to challenge, because the rationale for the intrusion is lessened without consent or a finding that the appointment is in the best interest of the children.

parents consent to the appointment diminishes the strength of any argument that the appointment is an improper delegation of judicial authority.

In Oklahoma, a court can appoint a Parenting Coordinator with or without consent of the parties.¹³⁴ For the court to appoint a Parenting Coordinator without the consent of both parties, two criteria must be satisfied. First, the court must make a finding that the case is a “high-conflict case.”¹³⁵ A “high-conflict case” under the Oklahoma Parenting Coordinator Act is

any action for dissolution of marriage, legal separation, paternity, or guardianship where minor children are involved and the parties demonstrate a pattern of ongoing litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, difficulty in communicating about and cooperating in the care of their children, or conditions that in the discretion of the court warrant the appointment of a parenting coordinator.¹³⁶

Secondly, the court must also make a specific finding that the appointment of a Parenting Coordinator is in the best interest of the minor child or children involved in the case.¹³⁷

¹³⁴ OKLA. STAT. ANN. tit. 43, § 120.3(A) (West 2010).

¹³⁵ OKLA. STAT. ANN. tit. 43, § 120.3(B)(1) (West 2010)..

¹³⁶ OKLA. STAT. ANN. tit. 43, § 120.2(2) (West 2010)..

¹³⁷ OKLA. STAT. ANN. tit. 43, § 120.3(B)(2) (West 2010). North Carolina’s Parenting Coordination statute is very similar to Oklahoma’s. It allows appointment with consent of the parties and allows appointment without consent of the parties only upon specific findings that the case is “a high-conflict case” and that the appointment of the Parenting Coordinator is in the best interest of the children. N.C. GEN. STAT. ANN. § 50-91 (West 2010).

Similarly, in Colorado, a court can appoint a Parenting Coordinator with or without consent of the parties.¹³⁸ Absent consent of the parties, a Colorado court may appoint a Parenting Coordinator only if the court finds that (1) the parties have “failed to adequately implement the parenting plan;” (2) mediation is inappropriate or has been attempted and was unsuccessful; and (3) the appointment of the Parenting Coordinator is in the best interest of the children.¹³⁹

Likewise, in Louisiana, a Parenting Coordinator may be appointed with¹⁴⁰ or without consent of both parties. Absent consent of both parties, a Parenting Coordinator may be appointed for “good cause.”¹⁴¹ There is “good cause” for appointing a Parenting Coordinator when a trial court determines that one or both of the parties (1) are unable or unwilling to make parenting decisions with one another without assistance of others or insistence of the court, (2) are unable or unwilling to comply with parenting agreements and orders, (3) have demonstrated an ongoing

¹³⁸ COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010). As discussed in *infra* Part IX, Colorado provides for appointment of a Parenting Coordinator with decision-making authority and a Parenting Coordinator without decision-making authority. A Parenting Coordinator *without* decision-making authority may be appointed without consent upon the findings discussed here. COLO. REV. STAT. ANN. § 14-10-128. 1 (West 2010). However, a Parenting Coordinator with decision-making authority can be appointed only with consent of the parties. COLO. REV. STAT. ANN. § 14-10-128.3(1) (West 2010).

¹³⁹ COLO. REV. STAT. ANN. § 14-10-128.1(2)(a)(I)-(III) (West 2010); *see also In re Marriage of Rozzi*, 190 P.3d 815, 819 (Colo. Ct. App. 2008) (recognizing that, if the parties do not agree to the appointment, the court must make certain findings before the appointment can be made).

¹⁴⁰ LA. REV. STAT. ANN. § 9:358.1(A) (2010) (“The court shall make the appointment on joint motion of the parties.”).

¹⁴¹ *Id.* (“On motion of a party or on its own motion, the court may appoint a parenting coordinator in a child custody case for good cause shown if the court has previously entered a judgment establishing child custody, other than an ex parte order.”).

pattern of unnecessary litigation, (4) refuse to communicate or have difficulty in communicating about and cooperating in the care of the children, and (5) refuse to acknowledge the right of the other parent to have and maintain a continuing relationship with the children.¹⁴²

In Idaho, reference to a Parenting Coordinator may be made with the parties' consent¹⁴³ or when the trial court has found that either (1) the issues appear to be intractable or have been subject to frequent re-litigation, (2) the well-being of a minor child is placed at risk by the parents' inability to co-parent civilly, or (3) other exceptional circumstances require such appointment to protect the child's best interests.¹⁴⁴

The Texas Parenting Coordination statute is more restrictive than the other Parenting Coordination statutes. Other statutes allow appointment of a Parenting Coordinator with both parents' consent even without the

¹⁴² LA. REV. STAT. ANN. § 9:358.1(A) (2010), Comment (c); Palazzolo v. Mire, 10 So. 3d 748, 779 (La. Ct. App. 2009) (citing LA. REV. STAT. ANN. § 9:358.1(A) (2010), Comment (c)).

¹⁴³ IDAHO R. CIV. P. 16(l)(3) ("The court, upon agreement of the parties or after having found on the record that the circumstances specified in [IDAHO R. CIV. P. 16(l)(2)] are present, may appoint a Parenting Coordinator in any action involving custody of minor children."). IDAHO CODE ANN. § 32-717D (current through the end of the 2010 Second Reg. Sess. of the 60th Legis.) provides statutory authorization for court appointment of a Parenting Coordinator. However, criteria and standards for qualifications, selection, appointment, termination of appointment, and duties and responsibilities of a Parenting Coordinator are set forth by the Idaho Supreme Court, *id.*, which the court has done in IDAHO R. CIV. P. 16.

¹⁴⁴ IDAHO R. CIV. P. 16(l). Arizona similarly provides that a court may appointing a Parenting Coordinator if the court finds any of the following: (1) that the parents are persistently in conflict with one another; (2) a history of substance abuse by either parent or family violence; (3) that there are serious concerns about the mental health or behavior of either parent; (4) that a child has special needs; or (5) that it would otherwise be in the children's best interests to appoint the parenting coordinator. ARIZ. R. FAM. L. PROC. 74.

trial court finding that, for example, the parents are high conflict or that appointment is in the “best interest of the children.”¹⁴⁵ The Texas statute prohibits appointment even with consent of the parties unless the trial court makes certain findings. Under the Texas statute, the court “*may not* appoint a parenting coordinator *unless* the court makes specific findings that” (1) the case is a high-conflict case or there is good cause shown for the appointment and (2) the appointment is in the best interest of any minor child in the suit.¹⁴⁶

California is also restrictive regarding when a Parenting Coordinator¹⁴⁷ can be appointed. Whereas Texas requires a trial court’s findings (consent of the parents alone will not suffice), California requires consent from the parents (trial court findings alone will not suffice). In California, Parenting Coordination may be used only when the parties consent.¹⁴⁸ Parenting Coordination was at one

¹⁴⁵ See, e.g., COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010) (requiring a trial court to make findings absent agreement of the parties); OKLA. STAT. ANN. tit. 43, § 120.3(B) (West 2010) (requiring a trial court to make findings if a party objects); ARIZ. R. FAM. L. PROC. 74(A) (“parents may agree to use a Parenting Coordinator . . . subject to approval by the court”); LA. REV. STAT. ANN. § 9:358.1(A) (2010) (“The court shall make the appointment on joint motion of the parties.”)

¹⁴⁶ TEX. FAM. CODE ANN. § 153.605(b) (Vernon 2009) (emphasis added).

¹⁴⁷ AFCC, *Implementation Issues*, *supra* note 3, at 537 (stating that Parenting Coordination in California is not called “Parenting Coordination;” professionals who fulfill the Parenting Coordinator role are called “special masters.”). The statute that is relied upon as providing authority for the Parenting Coordination role is California’s special master statute, *id.*, which has broader application than just to Parenting Coordination. See CAL. EVID. CODE § 730 (West 2011).

¹⁴⁸ *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766 (Cal. Ct. App. 1997). Although the holding of *Ruisi v. Thieriot* might be interpreted more narrowly, courts have subsequently interpreted it as a bar to appointment without the consent of both parties. AFCC, *Implementation Issues*, *supra* note 3, at 537; Coates et al., *supra* note 3,

time widely used in California without consent, although has never been authorized by statute. However, once a court addressed the issue, it was determined that Parenting Coordination could not occur without consent of the parties.¹⁴⁹ The appointment depends on California's special master statute, which does not allow reference to a special master to the extent needed to fulfill the role of Parenting Coordination without consent of the parties.¹⁵⁰ For example, a Parenting Coordinator must necessarily interpret existing court orders. The court viewed interpretation of existing orders as a question of law, which cannot be referred to a special master without consent.¹⁵¹ Appointment of a Parenting Coordinator also assumes that the Parenting Coordinator will address disputes that are, at the time of the appointment, unknown. California's special master statute, however, does not provide authority to refer unknown future disputes to a special master.¹⁵² Thus, the court determined that the appointment of a Parenting Coordinator, who would interpret a court order and address future disputes, could not stand without consent of the parties.¹⁵³ The California situation demonstrates that, when the authority to appoint a Parenting Coordinator is lacking, circumstances surrounding the Parenting Coordinator's appointment and role must be adjusted to compensate for the lack of authority.

at 249.

¹⁴⁹ *Ruisi*, 62 Cal. Rptr. 2d 766; AFCC, *Implementation Issues*, *supra* note 3, at 537.

¹⁵⁰ *Ruisi*, 62 Cal. Rptr. 2d at 774 (stating that the distinction between reference to a special master with consent and reference without consent is "carefully preserved in the statutes in order to comply with the constitutional mandate").

¹⁵¹ *Id.* ("The trial court has no authority to refer questions of law. . . . Disputes involving interpretation of the existing custody orders, for example, may present questions of law.").

¹⁵² *Id.* ("The trial court has no authority to compel a reference of unknown future disputes.").

¹⁵³ *Id.*

Where the parties consent to the appointment, their ground for objection to the appointment is not well-founded. Even where parties do not consent to the appointment, if the trial court has made specific findings to justify the appointment, such as a finding that the parents are in high conflict or that the appointment of the Parenting Coordinator is in the best interest of the children, the additional intrusion into the family by appointing a Parenting Coordinator may be justified. However, as demonstrated by the California example, without an enabling rule or statute, this is less likely to be true. Thus, a court seeking to appoint a Parenting Coordinator with or without an enabling statute is well advised to condition appointment of a Parenting Coordinator on either the consent of the parties or some factual findings of the trial court that would justify appointment of the Parenting Coordinator.

IX. Limitation on Parenting Coordination: Review by Appointing Trial Court

The appointment of a Parenting Coordinator is more likely to constitute an improper delegation of judicial authority if the Parenting Coordinator exercises decision-making authority because decision making is the essence of the judicial power.¹⁵⁴ However, as discussed in Part V above, the practical benefits of Parenting Coordination dissipate as the Parenting Coordinator's decision-making authority decreases. Thus, jurisdictions seeking to implement an effective Parenting Coordination program must find a balance. To maximize the benefits of Parenting Coordination, the Parenting Coordinator should have some degree of decision-making authority; on the other hand, the Parenting Coordinator cannot be granted so much decision-making authority that the grant constitutes an improper

¹⁵⁴ See *supra* note 71.

delegation of judicial authority. There must be adequate opportunity for review by the trial court.

Assigning the *final* decision-making authority to a Parenting Coordinator is an improper delegation of judicial authority; the parties must have the opportunity for the trial court to review any decision of the Parenting Coordinator. On the other hand, if the Parenting Coordinator's decision has no binding effect and is subject to a lengthy and tedious review process, one of the primary benefits of Parenting Coordination – expeditious resolution of conflict – is sacrificed. Thus, a legal and effective Parenting Coordination program must strike a balance between review that is adequate but is not so burdensome as to render Parenting Coordination futile.

A. Review Required

Of the six states with a statute or court rule that allows a Parenting Coordinator to have decision-making authority,¹⁵⁵ five of them require that the Parenting Coordinator's decision be subject to review by the trial court. The statutes or court rules of three of them – Arizona,¹⁵⁶ Colorado,¹⁵⁷ and North Carolina¹⁵⁸ – provide a

¹⁵⁵ Arizona, Colorado, Florida, Idaho, North Carolina, and Oklahoma have statutes or court rules allowing for decision-making by the Parenting Coordinator. Louisiana, Oregon, Texas, and Vermont have Parenting Coordination statutes, but they do not allow for decision-making authority.

¹⁵⁶ In Arizona, a Parenting Coordinator may make a decision only when a “short-term, emerging, and time sensitive situation or dispute” arises that requires an “immediate decision for the welfare of the children and parties.” ARIZ. R. FAM. L. PROC. 74(G). In that situation, the Parenting Coordinator's decision is temporary but binding. *Id.* It is, however, subject to review and entry of an appropriate order at “the judge's earliest opportunity.” *Id.*

¹⁵⁷ COLO. REV. STAT. ANN. § 14-10-128.3(1) (West 2010). Colorado allows the appointment of “decision-maker” upon consent of the parties. *Id.* The decision-maker has “binding authority” to resolve

mechanism for judicial review of the Parenting Coordinator's decision. Although Idaho's rule¹⁵⁹ and Oklahoma's statute¹⁶⁰ do not specifically provide a

disputes regarding implementation or clarification of a preexisting court order. *Id.* His decisions are immediately effective. *Id.* § 14-10-128.3(3). However, a party may request that the trial court modify the decision-maker's decision after a de novo hearing. *Id.* § 14-10-128.3(4)(a). The court has discretion as to whether to grant the de novo hearing. *See id.* § 14-10-128.3(4)(b).

¹⁵⁸ North Carolina's Parenting Coordination statute allows the court to authorize the Parenting Coordinator to "decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve." N.C. GEN. STAT. ANN. § 50-92 (West 2010). The Parenting Coordinator's decision is binding until court review, but the parties may request an "expedited hearing" to review a Parenting Coordinator's decision. *Id.* § 50-92(b) (West 2010).

¹⁵⁹ Idaho Rule of Civil Procedure 16 makes clear that the appointment of a Parenting Coordinator does not "divest the court of its exclusive jurisdiction to determine fundamental issues of custody, visitation, and support...." IDAHO R. CIV. P. 16(l)(5). However, it also allows the Parenting Coordinator to make some decisions. *See, e.g.,* IDAHO R. CIV. P. 16(l)(1) (stating that the Parenting Coordinator "will make decisions or recommendations as may be appropriate when the parties are unable to do so"). While the trial court may designate that some decisions of the Parenting Coordinator shall be reviewed by the court before taking effect, Rule 16 does not specifically provide that any and all decisions of the Parenting Coordinator may be reviewed by the trial court. However, the Idaho Supreme Court clarified in *Hausladen v. Knoche*, that the language of Rule 16 does not give a Parenting Coordinator judicial powers of decision making. 235 P.3d 399, 403 (Idaho 2010). Instead, "the judicial function of final decision-maker remains with the court and is not delegated." *Id.*

¹⁶⁰ The Oklahoma Parenting Coordination statute, similar to the Idaho Rule, *see supra* note 153, specifically states that the appointment of a Parenting Coordinator does not "divest the court of its exclusive jurisdiction to determine fundamental issues of custody, visitation, and support" OKLA. STAT. ANN. tit. 43, § 120.3 (West Supp. 2011)). However, the Oklahoma statute also allows the Parenting Coordinator to make some decisions, *id.* § 120.3(A) (allowing appointment of a Parenting Coordinator to "decide disputed issues"), some of which shall be reviewed by the trial court before taking effect. *Id.* §

mechanism for review therein, appellate courts of those states have held that the Parenting Coordinator's decision must be reviewed by the trial court.¹⁶¹

Challenges to the appointment of a Parenting Coordinator as an improper delegation of judicial authority have been successful to the extent that the Parenting

120.3(C)(3). However, the Oklahoma statute does not specifically provide that all decisions of a Parenting Coordinator are reviewable; nevertheless, the Oklahoma Court of Civil Appeals has held that a Parenting Coordinator's decision is conditional and temporary subject to the court's review, noting that the trial court has the "ultimate responsibility" as the arbiter of a child's best interest in custody matters." *Fultz v. Smith*, 97 P.3d 651, 655 (Okla. Civ. App. 2004).

¹⁶¹ Florida is the only state whose statute provides for a Parenting Coordinator to have decision-making authority but does not yet require the opportunity for judicial review of the Parenting Coordinator's decision. Florida's Parenting Coordination statute appears to allow the Parenting Coordinator to have decision-making authority. FLA. STAT. ANN. § 61.125(1) (West Supp. 2011) (allowing the Parenting Coordinator to "with the prior approval of the parents and the court, mak[e] limited decisions within the scope of the court's order"). However, the statute provides no mechanism for judicial review of the Parenting Coordinator's decision. *See id.* § 61.125. However, Florida's statute has been effective since only October 1, 2009, and no Florida appellate court has yet considered the issue. It is likely that a Florida court considering the issue would hold that the Parenting Coordinator's decision is not immune from judicial review. *Cf. Martin v. Martin*, 734 So. 2d 1133, 1136 (Fla. Dist. Ct. App. 1999) (holding that a court order allowing a mediator absolute authority to establish a visitation schedule for the parties must be stricken because the trial court could not "delegate its judicial authority to ultimately resolve the issue and settle disputes between the parties"). *Martin v. Martin* might, however, be distinguishable from a Parenting Coordination case that may appear before a Florida court in that the decision of the mediator in *Martin* initially resolved the conflict whereas a Parenting Coordinator's decision should be limited to resolving conflicts regarding a preexisting court order. *See Martin*, 734 So. 2d 1133. Nonetheless, a holding that the Parenting Coordinator's decision is completely immune from review would be inconsistent with the decisions of other jurisdictions addressing the same question. *See, e.g., Hausladen* 235 P.3d at 403; *Fultz*, 97 P.3d at 655.

Coordinator's decision was perceived to be final – not subject to court review. A Parenting Coordinator's decision should be subject to court review even where the parties consent to the Parenting Coordinator's authority to make a decision that is not reviewable by the court.¹⁶²

None of the five states discussed above that require review by the trial court of any decision by the Parenting Coordinator have considered the question of whether a party could *agree* to the Parenting Coordinator's decision being final – in other words, waive the right to review by the trial court. However, it is the court's role to ultimately safeguard the best interest of the children.¹⁶³ Thus, abrogation of that responsibility to any non-judicial designee is probably not proper, be it by statute, by the court's own decision, or by agreement of the parties.

In a state with a Parenting Coordination statute that does not provide for decision-making authority, it has been held that consent of the parties could not permit a Parenting Coordinator to have decision-making authority *without* court review; however, consent of the parties could permit a Parenting Coordinator to have decision-making authority

¹⁶² Another consideration not addressed in this Article is what the standard of review for a Parenting Coordinator's decision should be. At least one court has indicated that it should be de novo. *See Fultz*, 97 P.3d at 654 (“The Act, in our view, clearly anticipates the trial court's de novo consideration of all the facts and circumstances of the case . . .”). Review is de novo by statute in Colorado. *See supra* note 157.

¹⁶³ *See, e.g., Martin v. Martin*, 734 So. 2d 1133, 1136 (Fla. Ct. App. 1999) (“While a trial court can order the parties to mediate the issue of visitation, it cannot delegate its judicial authority to ultimately resolve the issue and settle disputes.”); *Kilpatrick v. Kilpatrick*, 198 P.3d 406, 410 (Okla. Civ. App. 2008) (“Requiring [the Parenting Coordinator's] recommendations to be viewed ‘as orders of the Court’ constitutes an improper delegation of judicial power to the parenting coordinator and is contrary to the parents’ due process rights under the Oklahoma and U.S. Constitutions.” (citing *Conaghan v. Riverfield Country Day School*, 163 P.3d 557 (Okla. 2007))).

with court review.¹⁶⁴ In *Heinonen v. Heinonen*,¹⁶⁵ the Oregon Court of Appeals held that a trial court cannot delegate final decision-making authority to a Parenting Coordinator, even with consent of the parties.¹⁶⁶ In *Heinonen*, the parties entered into an agreement that allowed the Parenting Coordinator to make decisions but did not provide for the trial court's review of that decision. Instead, the agreement provided that issues such as visitation conflicts, interpretation of the clauses of the parties' divorce decree, and scheduling conflicts not anticipated by the decree "shall be within the province of the [Parenting Coordinator] to resolve."¹⁶⁷ The Oregon Court of Appeals determined that allowing the Parenting Coordinator to make a final decision would deprive the trial court of its statutorily-mandated authority to determine issues of child custody and visitation time as well as the modification thereof.¹⁶⁸ An Oregon trial court's authority is "wholly statutory," and no statute authorizes the trial court to delegate that authority to a Parenting Coordinator.¹⁶⁹ Thus, the delegation of final decision-making authority was impermissible even though the parties had agreed to it. The court further reasoned that the delegation would conflict with the legislature's policy that the court develop a parenting plan and that the court

¹⁶⁴ *Heinonen v. Heinonen*, 14 P.3d 96 (Or. Ct. App. 2000).

¹⁶⁵ *Id.*

¹⁶⁶ The Oregon statute does not use the term "Parenting Coordinator," but allows a court to appoint one to serve in that role. *See* OR. REV. STAT. ANN. § 107.425(3)(a) (West 2010) (stating that a court may "appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist parents in creating and implementing parenting plans").

¹⁶⁷ *Heinonen*, 14 P.3d at 97.

¹⁶⁸ *Id.* at 99.

¹⁶⁹ *Id.*; *see also supra* note 63.

modify custody and visitation in the best interest of the children.¹⁷⁰

However, in a later case, where the trial court would review the Parenting Coordinator's decision – the trial court had the *ultimate* decision-making authority – the Oregon court held that the trial court could delegate *initial* decision-making authority to the Parenting Coordinator.¹⁷¹ In *Polacek v. Polacek*,¹⁷² the parties entered into an agreement to allow visitation “only as recommended by” the Parenting Coordinator.¹⁷³ However, the agreement also stated that a party had the option to challenge an adverse recommendation and that the final decision rested with the court.¹⁷⁴ The Oregon Court of Appeals held that that agreement did not improperly delegate authority of the court to a non-judicial designee because the *final* decision rested with the court.¹⁷⁵

B. Binding or Stayed Pending Review

¹⁷⁰ The court did note, however, that nothing would prevent the parties from entering into an agreement to use a mediator or arbitration to reach a joint agreement as a result thereof and to stipulate into court their joint decision. *Heinonen*, 14 P.3d at 99 n.3. However, whether such a stipulation should be incorporated remains within the providence of the court to decide. *Id.* It would still be within the role of the court to ensure that the parties' agreement is consistent with the best interest of the child. *Id.*

¹⁷¹ *Polacek v. Polacek*, 222 P.3d 732 (Or. Ct. App. 2009).

¹⁷² *Id.*

¹⁷³ The recommendations were actually made by the child's therapist. “Parenting Coordinator” is used here for consistency. *See supra* note 166 and accompanying text explaining that Oregon's statute does not use the term “Parenting Coordinator,” yet allows the court to appoint someone to serve in that role; *see also* Kirkland, *PC Laws, Rules and Regulations*, *supra* note 8 (discussing problems regarding inconsistency of nomenclature across jurisdictions).

¹⁷⁴ *Polacek*, 222 P.3d, at 735.

¹⁷⁵ *Id.*

Another consideration is whether the Parenting Coordinator's reviewable decision is immediately effective or is stayed until a prescribed time period for "appeal" to the trial court has expired or the trial court has reviewed the Parenting Coordinator's decision. It could be argued that, where a Parenting Coordinator's decision is immediately effective, it has the force and effect of a trial court order, if only for a short time. In some circumstances, that "interim" decision could effectively be the final decision. For example, if a Parenting Coordinator makes a decision regarding an upcoming visitation weekend and that weekend comes and goes before the trial court review. In such a situation, the Parenting Coordinator's decision-making authority is arguably an improper delegation of judicial authority.

The Oklahoma Parenting Coordination statute provides that certain types of decisions made by a Parenting Coordinator are "immediately effective" and some require court approval before coming into effect.¹⁷⁶ Perhaps somewhat contrary to its own statute, which allow some decisions to be effective without review, the Oklahoma Court of Civil Appeals has held that treating a Parenting Coordinator's recommendation as an "order of the court" constitutes an improper delegation of judicial

¹⁷⁶OKLA. STAT. ANN. tit. 43, § 120.3(C) (West 2010) (providing that a court order appointing a Parenting Coordinator shall specify which "determinations will be immediately effective and which will require an opportunity for court review prior to taking effect"). Idaho's Parenting Coordination rule also provides that some types of Parenting Coordinator decisions are effective without previous court review. IDAHO R. CIV. P. 16(l)(8) (stating "decisions with respect to matters submitted under [Rule 16(l)] 5(B) will be effective when communicated to the parties. Recommendations under [Rule 16(l)] 5(C) will be effective fourteen (14) days after submission to the court.") The North Carolina statute provides the same, but allows for a party to petition the court for "expedited" review. N.C. GEN. STAT. ANN. § 50-92(b) (West 2010).

power to the Parenting Coordinator.¹⁷⁷ In some circumstances, an immediately effective recommendation, although subject to review, could be the functional equivalent of an order of the court.¹⁷⁸ Thus, allowing the Parenting Coordinator to make such a determination may actually constitute an improper delegation of judicial authority.¹⁷⁹

A Kentucky court has impliedly rejected a similar argument.¹⁸⁰ In *Telek v. Bucher*, a father argued that the appointment of a Parenting Coordinator was essentially an order to participate in binding arbitration and that the appointment constituted an improper delegation of judicial authority to a third party.¹⁸¹ The trial court had ordered the

¹⁷⁷ Kilpatrick v. Kilpatrick, 198 P.3d 406, 410 (Okla. Civ. App. 2009). Although the *Kilpatrick* court did not directly address the provision of the Parenting Coordinator statute that allows for a court order to designate certain parts of a Parenting Coordinator's recommendations to be "immediately effective," the court said that requiring the Parenting Coordinator's recommendations to be viewed "'as orders of the Court' constitutes an improper delegation of judicial power to the parenting coordinator, and is contrary to the parents' due process rights under the Oklahoma and U.S. Constitutions."

¹⁷⁸ See, e.g., hypothetical at *supra* p. 401.

¹⁷⁹ See *Fultz v. Smith*, 97 P.3d 651, 654 (Okla. Civ. App. 2004) (stating that the Act clearly makes any decision of the Parenting Coordinator "conditional and temporary subject to the court's review on timely objection."). However, that seems to disregard the language of the Oklahoma statute that allows at least some decision of the Parenting Coordinator to be immediately binding, at least until court review, which will apparently take about twenty days.

¹⁸⁰ *Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. Ct. App. Apr. 2, 2010).

¹⁸¹ *Id.* at *5. A similar argument was rejected by a Tennessee court. *Nesbitt v. Nesbitt*, No. M2006-02645-COA-R3-CV, 2009 WL 112538 (Tenn. Ct. App. Jan. 14, 2009). The wife in *Nesbitt* argued that the Parenting Coordinator was a "substitute Judge who is authorized to make recommendations, effective immediately as Orders, which violate the most fundamental constitutional rights." *Id.* at *6 (quoting the wife's argument). The appellate court, however, interpreted the order appointing the Parenting Coordinator as simply allowing the Parenting

parties to “participate in Parenting Coordination.”¹⁸² The father argued the process was essentially binding arbitration because he was forced to abide by the Parenting Coordinator’s determination to which he objected during the period of time that it would take to obtain a final decision from the court.¹⁸³

The court did not squarely address the father’s argument. Instead, it was convinced that the Parenting Coordinator was “simply supervising the court’s orders” to ensure that the terms of its orders are carried out.¹⁸⁴ The court emphasized that the Parenting Coordinator is to make a decision that complies with the pre-existing orders of the court and that such decisions are to be made only in instances where the parties cannot reach an agreement.¹⁸⁵ In addition, where a party disagrees with the Parenting Coordinator’s determination, he can seek a final determination from the court.¹⁸⁶ Because the Parenting Coordinator would make decisions that were consistent with the court’s order and the trial court could review the decision, the court was not apparently troubled by the fact that the parties would be bound by the Parenting Coordinator’s decisions in the interim.¹⁸⁷

C. Expediency

Coordinator to make recommendations, not decisions, and thus did not find the Parenting Coordinator’s responsibilities to impose on the court’s authority. *Id.*

¹⁸² *Telek*, 2010 WL 1253473 at *5. The court described a Parenting Coordination as “a type of counseling service for parents who are unable to communicate or reach agreements regarding the day-to-day custody arrangements of their children.” *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* (referring to the guardian ad litem’s argument).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

Perhaps the court in *Telek* recognized that, if the Parenting Coordinator's decision has no binding effect, one of the primary benefits of Parenting Coordination, expeditious resolution of conflict, is sacrificed. Of course, the trial court's review must be meaningful, but the Parenting Coordination process must be meaningful as well if the process is to be useful. If a Parenting Coordinator's decision is subject to a stringent review process, its utility is questionable at best.

For example, the review provision of the Oklahoma statute discussed in Part IX.B. above appears to be inconsistent with one of the purposes of Parenting Coordination, which is to facilitate expedient conflict resolution. Although a decision of a Parenting Coordinator is binding on the parties until further order of the court,¹⁸⁸ the statute provides that decisions of the Parenting Coordinator "shall be filed with the court within twenty (20) days."¹⁸⁹ Objections to the Parenting Coordinator's decisions or recommendations should be filed within ten days,¹⁹⁰ and responses to the objections filed ten days thereafter.¹⁹¹ Then, the court shall review the objections and responses and "thereafter enter appropriate orders."¹⁹² The trial court's review of the Parenting Coordinator's recommendation or decision is de novo.¹⁹³ Given the period

¹⁸⁸ OKLA. STAT. ANN. tit. 43, § 120.4(B) (West 2010) ("Any decisions made by the parenting coordinator authorized by the court order and issued pursuant to the provisions of the Parenting Coordinator Act shall be binding on the parties until further order of the court.").

¹⁸⁹ OKLA. STAT. ANN. tit. 43, § 120.4(A)

¹⁹⁰ OKLA. STAT. ANN. tit. 43, § 120.4(C)(1). The court may order objections to be filed within a different time period. *Id.*

¹⁹¹ OKLA. STAT. ANN. tit. 43, § 120.4(C)(2).

¹⁹² OKLA. STAT. ANN. tit. 43, § 120.4(D).

¹⁹³ *Fultz v. Smith*, 97 P.3d 651, 654 (Okla. Civ. App. 2004) ("The Act, in our view, clearly anticipates the trial court's de novo consideration of all the facts and circumstances of the case, grants discretionary authority to the trial court to accept or reject the PC's decision, and permits the trial court to enter 'an appropriate order' as the

for objection and the de novo review, this process does not provide for particularly expedient resolution of conflict.

D. Balance

A balance must be struck between review that is sufficiently meaningful that the Parenting Coordinator's decision-making authority does not usurp judicial powers but is sufficiently limited so that the utility of the Parenting Coordinator process is not diminished to the point of being futile. Given the fine line between "too much" and "not enough" decision-making authority, the question is raised whether the benefits of Parenting Coordination warrant walking that line. To answer that question, compare the situation of high-conflict parents with irreconcilable differences regarding a minor change to the visitation schedule for a soon-upcoming holiday with and without the benefits of a Parenting Coordinator. Would these high-conflict parents, who cannot reach an agreement *with* the assistance of the Parenting Coordinator, be better situated if they were to avoid the Parenting Coordination process altogether? The answer is probably "no."

The Parenting Coordination process provides the parents with a better possibility for resolving the conflict. Without the Parenting Coordination process, the high-conflict parents who could not reach an agreement *with* the assistance of the Parenting Coordinator are not likely to reach an agreement if left to their own devices. Instead, they will have to resort to the court and wait. They will not likely get a decision from the trial court sooner than they would have gotten a decision from a Parenting Coordinator. In contrast, with the Parenting Coordination process, the parents will have *some* decision made in a timely manner. Because it increases the likelihood of agreement and allows

circumstances of the case warrant, whether in agreement with or contrary to the decision of the PC.").

for expedient decisions, even with the required review, the Parenting Coordination process is superior to the alternative, a court decision that could come so late as to be meaningless.

Although one of the parties will be bound by an adverse decision until the court reviews it, one of the parties will be aggrieved and bound by the court decision if the parties were to initially go to court, assuming their issue could even get before the court in time for a meaningful decision to be made. One might argue that allowing a Parenting Coordinator's decision to be binding pending appeal, and the possibility that the matter about which the parents are in dispute may pass during the pendency, the review of the Parenting Coordinator's decision is likewise a court decision that comes so late as to be meaningless. That argument is perhaps legitimate. But, as set out above, the same is true without the Parenting Coordination process; the parties may not be able to get before a judge before the matter in dispute passes. Thus, either with or without Parenting Coordination, a decision may be made by the trial court so late that that decision is not meaningful. In contrast, with the Parenting Coordination process, there is at least some decision made by some neutral party in a manner that it sufficiently timely as to be meaningful. "Staying" the effectiveness of a Parenting Coordinator's decision until the parties can go before the court for approval undermines the role of the Parenting Coordinator, which is to facilitate expedient resolution of conflicts.

The judicial review component of the Parenting Coordination process is necessary to uphold the Parenting Coordination process. However, any decision by the Parenting Coordinator should be binding pending review in order to fulfill one of the primary purposes of Parenting Coordination: to reach decisions in a timely manner to the benefit of the parents and their children.

X. Further Limitations on the Parenting Coordinator's Decision-Making Authority

A. Consent to the Parenting Coordinator's Decision-Making Authority

Another means of protecting against a challenge to a Parenting Coordinator's decision-making authority is to require that the parties consent – beyond the mere appointment of the Parenting Coordinator – specifically to the Parenting Coordinator having decision-making authority.¹⁹⁴ Some jurisdictions allow the Parenting Coordinator to have decision-making authority only with the parties' specific consent to the Parenting Coordinator's decision-making authority. In Colorado, what it calls a "Parenting Coordinator" is not authorized to make decisions¹⁹⁵ but, in conjunction with its Parenting Coordinator statute, Colorado authorizes the appointment of a "domestic relations decision-maker" who is in essence a Parenting Coordinator with decision-making authority.¹⁹⁶ A "decision-maker" can be appointed only with the consent

¹⁹⁴ Cf. Allison Glade Behjani, *Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings*, 2007 UTAH L. REV. 823, 835 (2007) (offering as a possible solution to constitutional problems associated with having special masters involved in custody matters allowing reference to a special master only with the parents consent to the reference).

¹⁹⁵ COLO. REV. STAT. ANN. § 14-10-128.1 (West 2010); see *In re Marriage of Dauwe*, 148 P.3d 282, 285 (Colo. App. 2006) (holding that provision of court order that purported to give the Parenting Coordinator authority to "resolve the differences between the parents when they cannot agree" granted decision-making authority to the Parenting Coordinator and was contrary to Colorado's Parenting Coordination statute).

¹⁹⁶ COLO. REV. STAT. ANN. § 14-10-128.3 (West 2010).

of the parties.¹⁹⁷ In Florida, a court is prohibited from granting a Parenting Coordinator any decision-making authority without the consent of the parties.¹⁹⁸

In Oregon, even though the Parenting Coordination statute does not provide for the Parenting Coordinator to have decision-making authority, a court has allowed a Parenting Coordinator to make decisions if the parties consent to it. Oregon's Parenting Coordination statute¹⁹⁹ does not grant the Parenting Coordinator decision-making authority; however, in *Polacek v. Polacek*,²⁰⁰ the parties agreed to allow visitation "only as recommended by" the Parenting Coordinator²⁰¹ and the court upheld this decision-making authority because, in part, of the parties' consent to that authority.²⁰²

Pennsylvania, which does not have a Parenting Coordination statute, has also allowed the use of a Parenting Coordinator to make decisions with the consent of the parties. In *Yates v. Yates*, the trial court delegated to the Parenting Coordinator "only ancillary custody disputes, such as determining temporary variances in the custody schedule, exchanging information and communication, and coordinating [the child's] recreational and extracurricular

¹⁹⁷ *Id.* ("at any time after the entry of an order concerning parental responsibilities and upon written consent of both parties, the court may appoint a qualified domestic relations decision-maker and grant to the decision-maker binding authority to resolve disputes between the parties as to implementation or clarification of existing orders. . .").

¹⁹⁸ FLA. STAT. ANN. § 61.125 (West 2010) (allowing the Parenting Coordinator to, "with the prior approval of the parents and the court, mak[e] limited decisions within the scope of the court's order of referral").

¹⁹⁹ OR. REV. STAT. ANN. § 107.425(3)(a) (West 2010).

²⁰⁰ *In re Marriage of Polacek*, 222 P.3d 732, 735 (Or. Ct. App. 2009).

²⁰¹ See *supra* note 170.

²⁰² The court's decision was also based on part on the fact that the Parenting Coordinator's decision was subject to review by the appointment trial court. See *supra* Part IX.A.

activities.”²⁰³ The Superior Court of Pennsylvania determined that allowing the Parenting Coordinator to make decisions about those issues was not an improper delegation of judicial authority in part because the parties had consented to the decision-making authority of the Parenting Coordinator.²⁰⁴

Requiring the parties’ consent in order for the Parenting Coordinator to have decision-making authority is not always necessary. However, such a requirement will weaken a subsequent argument that granting decision-making authority to the Parenting Coordinator was an improper delegation of judicial authority. Thus, where specific statutory or rule-based authority is lacking, such a requirement may be prudent.

B. Limiting the Decision-Making Authority to Specific Issues

Limiting a Parenting Coordinator’s decision-making authority to very specific “minor” issues can also protect against an argument that granting the Parenting Coordinator decision-making authority is improper.²⁰⁵ Where the issues on which a Parenting Coordinator may make a decision are minor or “ancillary” to the court’s order, his decision-making authority is less problematic.²⁰⁶ Some statutes limit the issues on which Parenting Coordinators may have decision-making authority. Others recognize that some issues should not be decided by a Parenting Coordinator but leaves it for a trial court to

²⁰³ *Yates v. Yates*, 963 A.2d 535, 540 (Pa. Super. Ct. 2008).

²⁰⁴ *Id.*

²⁰⁵ See Behjani, *supra* note 194, at 835 (offering as a possible solution to constitutional problems associated with having special masters involved in custody matters allowing reference to a special master only regarding “small factual disputes”).

²⁰⁶ See, e.g., *Yates*, 963 A.2d 535.

delineate the issues on which the Parenting Coordinator may have decision-making authority.

The Idaho Rule providing for Parenting Coordination lists matters in which a Parenting Coordinator may or may not make a decision. It gives examples, “[b]y way of illustration and not limitation,” of what matters a trial court may authorize a Parenting Coordinator to determine. A Parenting Coordinator in Idaho may be granted the authority to make decisions regarding: (1) time, place, and manner of pickup and delivery of the children; (2) child care arrangements; (3) minor alterations in parenting schedule with respect to weeknight, weekend, or holiday visitation that do not substantially alter the basic time share allocation; (4) participation by significant others and relatives in visitation; (5) first and last dates for summer visitation; (6) schedule and conditions of telephone communication with the children; (7) manner and methods by which the parties may communicate with each other; (8) approval of out-of-state travel plans; and (9) any other issues submitted for immediate determination by agreement of the parties.²⁰⁷ In contrast, a Parenting Coordinator may not be authorized by a court order to make decisions on certain issues. On the following issues, a Parenting Coordinator may make only recommendations to the court: (1) which parent may authorize counseling or treatment for a child; (2) which parent may select a school; (3) supervision of visitation; (4) submission to a custody evaluation; (5) appointment of an attorney or guardian ad litem for a child; and (6) financial matters including child support, health insurance, allocation of dependency exemptions and other tax benefits, liability for particular expenditures for a child.²⁰⁸

A legislature or court rule establishing a list such as the above indicates that the rule-making body has

²⁰⁷ IDAHO R. CIV. P. 16(I)(5)(B).

²⁰⁸ IDAHO R. CIV. P. 16(I)(5)(C).

preemptively made some determination as to those kinds of issues that would constitute an unlawful delegation of judicial authority and those that would not. Another interesting aspect of Idaho's Parenting Coordinator rule is the language that prefaces the above lists and generally describes a Parenting Coordinator's decision-making authority. Idaho allows Parenting Coordinator to make decisions *only insofar as necessary to serve the best interest of the rule*. The rule provides that:

The Parenting Coordinator will make such decisions or recommendations as may be appropriate when the parties are unable to do so. The goal of the Parenting Coordinator should always be to empower the parents in developing and utilizing adaptive parenting skills so that they can resume the parenting and decision making role in regard to their own children. When it is not possible for the parents to agree, the Parenting Coordinator shall provide *only the amount of direction and service required in order to serve the best interest of the child by minimizing the degree of conflict between the parties*.²⁰⁹

This provision quite wisely strikes a balance: it grants Parenting Coordinator decision-making authority, thus achieving the benefits of Parenting Coordinator, but professes to go only so far as necessary to promote the best interests of the children. Thus, this limitation perhaps insulates the rule from a challenge that it improperly delegates judicial authority to a Parenting Coordinator.

Arizona's rule of court allowing for a Parenting Coordinator appointment also limits the issues on which a Parenting Coordinator may make a decision, but that limitation is to exigent circumstances. Arizona's rule does

²⁰⁹ IDAHO R. CIV. P. 16(l)(1) (emphasis added).

not grant the Parenting Coordinator any decision-making authority outside of the following provision, which allows for decision making in times of exigency:

When a short-term, emerging, and time sensitive situation or dispute within the scope of authority of the Parenting Coordinator arises that requires an immediate decision for the welfare of the children and parties, a Parenting Coordinator may make a binding temporary decision.²¹⁰

Like Idaho's rule, this achieves some balance of granting enough decision-making authority for effectiveness but not so much as to constitute an improper delegation of judicial authority, although in a different way.

Rather than specifying the issues on which a Parenting Coordinator may make a decision, some jurisdictions require specification, but leave it to the trial court to delineate which issues may be decided by the Parenting Coordinator. Oklahoma is one example; it provides that:

The parenting coordinator shall not make any modification to any order, judgment or decree; however, the parenting coordinator may allow the parties to make minor temporary departures from a parenting plan if authorized by the court to do so. The appointment order should specify those matters which the parenting coordinator is authorized to determine.²¹¹

²¹⁰ ARIZ. R. FAM. L. P. 74(G). The decision is subject to review. *Id.* ("The decision shall be submitted to the assigned judge with a copy to the parties (or counsel, if represented) in a written report that shall document all substantive issues addressed and the basis for the decision for review and entry of any appropriate orders at the judge's earliest opportunity.").

²¹¹ OKLA. STAT. ANN. tit. 43, § 120.3(C)(3) (West 2010).

Specifically limiting the issues on which the Parenting Coordinator may make a decision is wise. Either the legislative body or court establishing the Parenting Coordination program should limit the issues, striking a balance between not allowing the Parenting Coordinator to make decisions that are invasive of the trial court's domain but are merely ancillary to the decision that the trial court has already made and allowing the Parenting Coordinator to make decisions on enough issues that his role is meaningful and provides the benefits that Parenting Coordination is intended to convey. Whether the issues on which a Parenting Coordinator may make a decision are specifically limited by statute or court rule or by the order for appointment, limiting the Parenting Coordinator's decision to issues that are ancillary to and within the scope of the already-existing trial court order is wise. Narrowing decision-making authority of the Parenting Coordinator protects against argument that it is an improper delegation of judicial authority but at the same time allows Parenting Coordination to bestow the benefits as intended.

XI. Conclusion

Parenting Coordination has the potential to bestow substantial benefits on parents, children, and the court system. However, the appointment does pose potential problems regarding improper delegation of judicial authority. A Parenting Coordination program can be viewed as a serious governmental intrusion into the day-to-day matters of a parent-child relationship if the role is not properly circumscribed. The role should be properly limited so that Parenting Coordination can bestow the benefits that it intends but also does not constitute an improper delegation of judicial authority.

Where the parameters of the role have not been set out in advance, lawyers, and perhaps even judges, might

not understand the Parenting Coordinator's role or how a Parenting Coordination program should operate within the existing constraints of the law. The potential misunderstanding contributes to the vulnerability of the appointment. A holding of invalidity could have implications not only for the instant appointment, but for the future of Parenting Coordination in that jurisdiction.

A jurisdiction that seeks to implement a proper and legal program, or a trial court judge who seeks to appoint a Parenting Coordinator without statutory or rule-based authority, must carefully consider limitations that are necessary or desired in the given jurisdiction so that Parenting Coordination can provide parents, children, and the state the benefits it offers. A Parenting Coordination program must achieve an appropriate balance between various legal aspects of a Parenting Coordination program including: the stage in litigation at which appointment will be allowed; under what conditions appointment will be allowed; whether the Parenting Coordinator will have decision-making authority; the reviewability of the Parenting Coordinator's decisions; and the limitations on the Parenting Coordinator's decision-making authority. Achieving the appropriate balance will mitigate the argument that the appointment is an improper delegation of judicial authority. However, the balance is a delicate one; Parenting Coordination will lose its utility if a proper balance is not achieved. For example, the Parenting Coordinator should have a sufficient degree of decision-making authority that Parenting Coordination is not merely another hoop for the parents to jump through on their way to court, yet not so much that the appointment is improper. In addition, the appointment must be limited to qualified professionals or else one of the essential components of and rationales for Parenting Coordination – guiding the parents with a goal of avoiding future conflict – is eviscerated.

Furthermore, the legal permissibility of a Parenting Coordination program will depend on whether the

Parenting Coordinator appointment is authorized by statute, court rule, or must rest on some other authority such as the trial court's inherent authority. For example, where Parenting Coordination is specifically authorized by a state's statute, it might be properly ordered and the Parenting Coordinator might have decision-making authority without consent of the parties. In contrast, where Parenting Coordination is not authorized by a statute or court rule, a jurisdiction would be wise to allow the Parenting Coordinator to have decision-making authority only with consent of the parties. Those limitations should increase in degree where the basis for the authority is lesser in degree. Weighed against the benefits to the children of divorce, whose best interests the state is obligated to protect, and the state itself, the balance tips in favor of Parenting Coordination.